Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1995

PAUL DANKO, JR.,

Petitioner,

vs.

JESSE BROWN, Secretary of Veterans Affairs,

Respondent.

PETITION FOR EXTRAORDINARY WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR EXTRAORDINARY WRIT OF CERTIORARI

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110 pp

QUESTIONS PRESENTED

The effectiveness of a Notice of Disagreement and the Timeliness of the same. The bad faith of the VA and the fact that the VA obliterated dates and altered files for the record before COVA. The fact that the Medical Records were not available to the VARO at the time of Remand and before COVA because the Medical Records had been given to the Military. Did the Circuit Court because of this faulty file fail to consider that the matter on Remand had a final determination on May 10, 1990, and a timely NOD was filed with the RO, fail to make a proper determination?

Whether the statement in the Opinion of the Circuit Court that Danko did not object and respond to the summary affirmance at COVA is patently wrong, in view of the 112 page affidavit filed at COVA on June 28, 1993, and is error as the summary affirmance was what was appealed to the Circuit Court?

Why did COVA Judge Steinberg not act upon the FIVE SERVICE CONNECTED SIMULTANEOUS CONTESTED DISABILITIES in his court that he acknowledged as unusual circumstances and granted good cause relief to the Secretary of the Veterans Affairs by COVA order dated June 11, 1992, Cova No. 90-911. Both Judge and Secretary had complete knowledge of the unusual and supported by extraordinary circumstances of disabled Veteran Paul Danko, Jr., Appellant, VA File No. C 18 39 715 and BVA Docket No. 87-35 514, dated June 21, 1988, five disabilities on Appeal in COVA?

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No._____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

TERM, 1995

PAUL DANKO, Jr.

Petitioner

vs.

JESSE BROWN, Secretary of Veterans Affair

Respondent

PETITION FOR EXTRAORDINARY

WRIT OF CERTIORARI TO THE UNITED

STATES COURT OF APPEALS FOR THE

FEDERAL CIRCUIT

Petitioner, PAUL DANKO, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit for the summary affirmance of the Court of Veterans Appeal's

judgment dismissing Paul Danko's Appeal for lack of Jurisdiction be set aside and for this Court to decide the issues herein.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit, No. 94-7022 not citable as a precedent pursuant to Fed. Cir. R. 47.6, although it is a public record. This opinion appears in the Appendix .A

The Court of Veterans Appeals, No.90-911, was the first Court Order made by Judge Steinberg May 13, 1993 and is to be found in the Appendix B.

The ORDER dated August 26, 1993 to dismiss by Judge Steinberg of the Court of Veterans Appeals appears in the Appendix C.

MEMORANDUM OF CONSIDERATION of the Board For Correction of Military Records of the Department of the Army Docket No. AC89-05566D appears in the Appendix.D.

JURISDICTION

A final decision by The United States Court of Appeals for the Federal Circuit is subject to appeal only by a Petition for Certiorari to the Supreme Court of the United States. The United States Court of Appeals for the Federal Circuit has exclusive jurisdiction of appeals from the Court of Veterans Appeals, who has jurisdiction of Final Decisions of the Board of Veterans Appeals. This case is an Army Veteran's claim for increased disability compensation.

The Supreme Court also has final appellate jurisdiction from the Department of the Army.

CONSTITUTIONAL and STATUTORY PROVISIONS INVOLVED

Amendment XIV to the United States Constitution is set forth in the Appendix E.

United States Code Title 10
United States Code Title 28,
United States Code Title 38

38 Code Of Federal Regulations

STATEMENT OF THE CASE

On August 1, 1980, the Board of Veterans Appeals (BVA) Washington, D.C. 2040 returned its finding and decisions, Docket 80-08-474 and denied the appeal for Total compensation based upon individual unemployability and/or service connected disability. See Appendix H.

Veteran filed continuous timely Notices of Disagreements (NOD) from 1980 and ever since the date of Honorable Discharge on January 24, 1962, and on March 2, 1987, the Veterans Administration Regional Office (VARO) of Pittsburgh, PA, issued a statement of the case for multiple service connected disabilities and issued a decision which denied an increase in percentage of disability dated Sept. 10, 1985, VARO erred in not giving consideration to the the Veterans left, middle and ring fingers, service connected and in the issue. Veteran's rate of compensation for service connected disabilities remained at 50%. This affidavit was filed with the Clerk of Court of Veterans Appeals (COVA) but it was not entered on the COVA docket that went to the U.S. Court of Appeals for the Federal Circuit, it can only be assumed that COVA did not consider this Affidavit, and, if so, its decision is faulty. The Affidavit of Veteran Paul Danko, Jr. to Judge Jonathan R. Steinberg's Order of May 13, 1993 No. 90-911 in the Unied States Court of Veterans Appeals this 28th day of June 1993. This Affidavit, filed with the Clerk of the United Stsates Court of Veterans Appeals relates to a U.S. Military Court to COVA and BVA, i.e., the Military had the records from the VARO and these records could not be obtained from the Secretary Jesse Brown by COVA for its determination because the VARO erred by sending the original records, both Administrative and Medical Files, to the Military and therefore could not produce any copies of the records for COVA. Note:the VARO to this date denies a copy

of the records for the Veteran and this counsel to present to this Court in order that proof from the records will justify this case as to the timely filed NODs because the records would reflect that the veteran filed a NOD each year. However probably the records are still with the Department of the Army. It is probable that the VARO is delaying until they can recover the original record which was not in the VARO at the time of BVA's remand Order examination with records on December 5, 1988, but an extensive record search by the Director of Records was to no avail and no records were anywhere in the VARO administrative offices or their Medical and Hospital facilities. The proof of this fact was presented as an attachment to the Affidavit of Paul Danko, Jr. filed with the Clerk of COVA which proves that the records C 18-309-715, SS No. 169-26-7266 were transferred and not available for the review by the VA Medical remand examiner, without which there could be no proper remand examination possible by the ORDER of the BVA.

Whether or not the VA has the records in the C 18-309-715 file of Paul Danko, Jr. at the present time, the file was with the Army at the time of the Remand and Dr. Laing's examinations and his diagnosis of "pericapsulitis and degenerative arthritis of left shoulder due to trauma in Service leading to complete loss of function of left upper extremities", which was not accepted by the VARO adjucicator V.W. Byrnes, allegedly because the records were not available to Dr. Laing.

On June 21, 1988, the BVA issued its findings under Docket No. 87 35 514 stamped 819105 dealing with the issue of a nervous condition evaluated at 50 % which the BVA denied, and the BVA issued a two part decision under DOCKET NO. 87-35 514, Date June 21, 1988, but lost track one half of this decision. Now on June 21, 1988, BVA issued a second LIKE finding and Decision with same Docket No. 87

35-514 stamped 819106, (one digit separating the two documents issued on the same date) dealing with other multiple service connected disabilities to include left shoulder, which was put on remand to the VARO, but however, the BVA dropped the second document of all other multiple service connected disabilities which was in error and when these multiple service connected disabilities were subject to disagreement by timely filed NOD, (the Final decision on Docket No 87 35 514, stamped in the lower right hand margin 819105 was a final decision Dated June 21, 1988 by the BVA, see Appendix G, which notes that both documents of this split decision are in the Record of Appeal but not mentioned by BVA or COVA, and not acted upon in this case. This is gross error as this case is for multiple service connected disabilities to include all awards 0% or other, all awarded by VA but not administered in a correct mannerand all with error. The NOD to this docket was filed by the Claimant Veteran on May 15, 1989 and received on May 16, 1989 which was timely, this NOD is to be found also in Appendix L, the VARO and BVA lost track of the NODs and especially the Veteran's NOD dated May 15, 1989 and received by VARO on May 16, !989, (this NOD complied with 38 CFR Chapter 1, section 20.201) however RO never acknowledged receipt and Veteran resent a copy of the same NOD on June 8, 1989 which was received by RO on June 9, 1989, Appendix M, which was also never acknowledged. NOTE that this NOD dated May 15, 1989, received by VARO on May 16, 1989 and resent to Pittsburgh Regional Office on June 8, 1989 because thr RO did not respond concerning the receipt on May 16, 1989, and are only referred to in the BVA Record on Appeal TABLE OF CONTENTS as letters from Claimant to VA pp. 119-122. filed by Pamela L. Wood, Deputy Assistant Attorney General for the Veterans Affairs. The three NOD's that were received by the VARO and not acknowledged appear in Appendices L., M. and N. (IT IS THIS TYPE OF CLERICAL AND ADMINISTRATIVE WANTON DECEPTION AND BAD

FAITH FIDUCIARY DUTY WHICH MISLED COVA, ALL WITHOUT EQUITY BY THE SIGNATORIES WHICH CREATED THE BAD FAITH DEEDS HERE IN THIS INSTANT CASE FOR THIS COURT TO SEE). which proves that VARO Adjudication Officer W.F. BYRNES, T.G. BENENDEK, M.D., Chief of Ambulatory Care Clinic (and overseer of all BVA Remand Orders in the Pittsburgh RO) and Pamela L. Wood, Counsel for VA, and Director of the VARO in Pittsburgh, PA Harold T. Bushey, all used deception and bad fiduciary faith, with wanton malice without any equity toward Veteran Danko, (38 U.S.C. section 7291 (b) (1), and 7292) and his rights under Code 38 and the CFR's thereto and the Veterans Constitutional Rights and rights under Title Seven of the Civil Rights Act. The NOD and the copy of the same are in the record submitted to COVA by the VA well after COVA was empowered. This appears in the record of this case submitted on January 3, 1992, by the BVA general counsel to COVA. Noting Danko underwent OPEN_HEART_SURGERY on 2/18/1992.This is the thrust of the case. The Veteran timely filed the NOD addressing the multiple service connected disabilities decisions (38 U.S.C. section 7505A, SIMULTANEOUS CONTESTED CLAIMS), and the VA erred again leading COVA to act also in error by not having the NODs and not having records that the Military Court obviously had. Thus the actions of all three; the VA, COVA, and the Military were with prejudice and arbitrary, capricious, an abuse of discretion and outside of the U.S. Code, Title 38, contrary to Constitution Right, power, privilege or immunity, and also in violation of statutory right, in violation of statutory jurisdiction and all without observance of procedure required by Law and regulations and reached their findings and decisions, in error and therefore must have all determinations and decisions and findings set aside and called clearly erroneous per ch. 72,COVA, sub chapter II, Procedure, U. S. CODE Title 38, section. 7261 (a), (1), (2), (3) (A) (B) (C) (D) (4), and section 2072. COVA

was indeed in error along with the BVA and Military Court that operated in unison and outside of the Law and Regulations. Noting again that COVA only dealt with the Left Shoulder, and not all the multi service connected disabilities as required by Law and Regulations. See Appendix G for complete BVA docket No. 87-35 514 and the two missing dates of this split decision docket in which Judge Steinberg searched for in his ORDERS, Appendices B & C in COVA case No. 90-911, and Appendix C-1. The COVA Judge did not rule on the five disabilities, the Judge and the Circuit Court only ruled on one of the five disabilities, and thus on one issue out of five issues and the lower Courts only ruled on the one issue the matter of the shoulder injury which had been on remand, and they ruled on this issue, shoulder injury, and erred when the ruling was that NOD was untimely, because the BVA submitted documents with the dates purposely obliterated.

COVA had before it the WHOLE BVA Docket No. 87-35 514 but only considered the portion of that docket that was remanded by the BVA and not the rest of the main multiple service connected Disabilities, 38 U.S.C. section 7505A (The nervous condition part of the docket had been rated at 50% and this disability finally caused total and permanent disability in April of 1979. It would be only judicial logic that this situation was the thrust of the Veterans appeal to COVA as demonstrated in Appendix H, the original outset of this claim for !00% for unemployability. V.A. Docket No. 80-08 474, dated August 1,1980, SEE Appendix I (38 C.F.R. Chap 1, section 3.102).

The BVA 's remand of the left shoulder from Docket No. 87-35 514 stopped all activity on the Docket and there was no decision by the BVA at that time nor could there be any decision until the remand item from the docket returned to

the BVA. Appendices L. & M. Had the BVA RECORD ON APPEAL, on January 3, 1992 signed by BVA counsel, been correct when submitted it is apparent just what BVA and COVA should have considered. Not both split decisions under one docket without dates as are in the RECORD ON APPEAL pp. 94 to 103, the BVA and COVA both erred. See Appendix G for these missing dates (Jan. 21, 1988). 38 .S. C. section 2072 applies here.

Neither COVA nor BVA treated 38 CFR Chap.1 SEC. 20.3, RULE 3, definitions (a) (m) as related to simultaneously contested claims,(38 U.S.C. section 7305A) i.e., neither COVA nor BVA used this term or its related sections, and the military had no right to demand the records from the VA that was bound under law to keep Danko's records in his RO, Pittsburgh Center. Copies should have been sent and the original records kept in the VARO to service and treat the Disabled Veteran. All the above caused this information and disallowed decisions and findings that were within the laws; all decisions of these U.S. government parties here were outside of Title 38 and many of its C.F.R's as stated and also did not use Section 7505 A with respect to the manifold NOD's filed with the BVA and its RO. On August 31, 1990, an appeal was filed with COVA that took into account the veterans service connected multiple disabilities which COVA never addressed but mentioned in its order dated May 13, 1993, by Judge Steinberg on the last page with signature, i.e., "Although the Veteran's October 1986 letter referring to his appeal for all service connected claims expresses disagreement. . . ." This COVA order is full of error as are the others. See Appendix B.

The above order will show that COVA was with records of veteran's wife which is erroneous for BVA for COVA to do and consider.

Nevertheless, on August 26, 1993, Judge R. Steinberg, (while noting that the secretary of the VA erred,) issued the blind order to dismiss and a motion by of all people, the secretary's motion, who only had four pages of records to send to COVA. Note that Judge Steinberg knew of five service connected disabilities and five issues on June 11, 1992, Appendix C-1. They were records of the veteran's wife, Berta Danko, and his daughter, Tanya R. Danko. How much more outside of the law can a court operate in the blind? See Appendices A & C, U.S. Government Appeals for the Federal Court and enclosed COVA motion and order to dismiss dated August 26, 1993. On November 8, 1994, the U.S. Court of Appeals for the Federal Circuit decided and denied veteran Danko via other cases that were in no way like to the Danko simultaneously contested awards for multi-service connected disabilities. See Appendix D, (Department of the Army, Board for Correction of Military Records, Doc. NO AC 89-05566D, May 31, 1995 appeal denied, Case of Paul Danko 169-26-7266 and RA 13355367). Note, Army did not advise the appellant of his rights under the law, i.e., Title 38 and 32, !0 U.S.C. section 1552 (b), noting that Disabled Veteran did not discover the injustice, by record, until May 24, 1988, some four and one-half months before filing the application for Army Discharge Review and Correction of injustice, which was denied as untimely, which was outside of the law.

By COVA Order dated June 11, 1992, signed by Judge Steinberg, there was an acknowledgment of the, "unusual circumstances ..... regarding several BVA decisions, five disabilities, and two files" and also five issues before the Court. Appendix C-1.After acknowledging by order these facts and then relying on the altered misinformation submitted by the Secretary of the VA through his Counsel, Judge Steinberg dismissed the case for lack of a timely NOD which was patently wrong as the acknowledged NODs, filed by the Disabled Veteran bore the proper dates and were timely as set forth herein.

REASONS FOR GRANTING THE WRIT OF EXTRAORDINARY CIRCUMSTANCES

The Veteran's Affairs Secretary was outside the law, 38 CFR Chap. 1, Sections 20.3, Rule 3, Definition (K) motion and 20.3 Rule 3 (m) simultaneously contested claims as to what they treated and the dates they used with reference to NOD's.

Veteran filed numerous NOD's for manifold service connected disabilities that BVA, COVA, and the military court operated outside of the law and did not address the veteran's claims as the records of the veteran were with the military court and never with COVA for Judge Steinberg before making his decisions, determinations, and orders. See Appendices C-1 and B where Judge Steinberg is looking for the date of January 21, 1988, which BVA or RO did not supply, which the Veteran believes to be pure deception to his detriment. Also see Appendix G for the missing dates of the BVA Docket 87-35 514 split decision (two parts) of June 21, 1988 which neither COVA nor BVA had for one reason or another. The Veteran believes that these very documents were with the Army at that time or the R.O. was hiding them.

The Veteran Paul Danko, Jr. filed a motion as follows:

"Chairman (01)
Board of Veterans Appeals
810 Vermont Avenue, N.W.
Washington, D.C. 20510-3802

Paul Danko, Jr.
415 Victoria Street
Belle Vernon, PA 15012
(412) 929-5596
S.S. No. 169-26-7266
VA Claim No. 18 309 715
RA 13355367

SUBJECT: MOTION under Authority:
38 U.S.C. 511(a), 7104 and sec. 20.100 and

20.800, Evidence and "Good Cause", sec. 20.900, Authority: 90 U.S.C. 7107, Motion filed for "Good Cause" of "U.S. Government and the Veteran." and Code 38 as of July 1, 1994, U.S. CFR's.

"MOTION TO CLOSE VA FILE C 18 309 715 PERMANTLY FOR GOOD CAUSE OF THE U.S. GOVERNMENT AND VETERAN PAUL DANKO, Jr. AND GRANT VETERAN 100% DISABILITY DUE TO INDIVIDUAL UNEMPLOYABILITY SINCE MAY 1,1979"

Since the Board of Veterans Appeals, Washington, D.C. 20420, Docket No. 80-08-474 dated August 1, 1980, Findings and Deceisions --the issue -- Entitlement to a total compensation rating based upon individual unemployability and Permanent Total Disability because of Service Connected Disabilities;

-AND-

Because the Medical and Clinical Records from Memorandum No. 111, Headquarters, Madigan Army Hospital, Tacoma, Wash. dated 29 Sept. 1961, to discharge date 24 Jan. 1962 Contained Information of past operation which were classified higher than Security Clearance of TOP SECRET, it is now this 11th Day of July, 1995 moved that the Record be Retired and Closed forever;and/or DESTROYED, all for ".GOOD CAUSE".

s/ Paul Danko, Jr.
July 11, 1995

cc. Pittsburgh VA Office-Home Record Center
cc. Director, Administrative Service (01)
Board of Veterans' Appeals
810 Vermont Avenue, N.W.
Washington, D.C. 20400
(Authority: 38 U.S.C. 7107

Notarial Seal
Marlene H. Gush, Notary Public
Monessen , Westmoreland County
My Commission Expres July 1, 1997
Member , Pennsylvania Association of Notaries

s/ Marlene H. Guss July 11, 1995"

This motion which gives good reason and good cause to grant an extraordinary writ authorized by 28 U.S.C, Section 1651(a) in as much as the security of our nation, its agents and operations of higher than top secret present more exceptional circumstances warranting swift and rapid action by this court. It is only proper that the Highest Court of our land would protect the highest security of this land and order the "Motion to close VA file C18309715 permanently for good cause of the U.S. government and veteran Paul Danko Jr. and grant veteran Danko 100% disability due to individual

unemployability since May 1, 1979.", as was requested by Danko in his motion filed with the Chairman (01) , Board of Veterans' Appeals, 810 Vermont Ave. N.W., Washington, D.C. 20420 dated July 11, 1995 and received by the BVA on July 14, 1995. The motion is set forth above but the 32 pages of exhibits which include medical records concerning Mr. Danko's open heart surgery on February 18, 1992 and many other medical reports which were sent to the VA several times but were never considered as called for by the Law.cited herein, and is part of the reason for granting the Writ in its entirety.

Veteran Danko has been disabled by order and decision of a Social Security Administrative Law Judge with a permanent disability rating based on the veteran's multi service connected conditions which the VA rates at 50%, noting that under Title 38, the VA is bound to treat other medical reports as if they were from the VA itself. 38 C.F.R. Sec. 3.201, Exchange of Evidence: Social Security and Department of Veterans Affairs.(a) (b) (Authority 38 U.S,C, 5105 < 38 U.S.C.A. section 5105 >) WESTLAW pp.499 (26 FR 1571, Feb. 24, 61,)

The final decision on the left shoulder was final by the BVA on May 10, 1990. This matter had been to the BVA upon a NOD filed with the VARO before 1988, the BVA Remanded the issue of the Left Shoulder on June 21, 1988 and the matter was still being contested by NOD filed before 1988 this was true until the final determination for the Left Shoulder occurred by the BVA on May 10, 1990 and the veteran's then Attorney filed an appeal to COVA on August 31, 1990 which was a timely appeal from a final BVA decision. COVA should never have dismissed this case, it was properly being contested before 1988 and continued being contested until the final decision by the BVA on May 10, 1990, and thereafter a timely appeal was made to COVA, and

timely NODs not considered by VA or COVA. A timely NOD to the final decision of May 10, 1990 was sent to the RO on October 5, 1990 which was timely. These matters were before the Court but ignored these NODs in Appendices L, M, and N.

BVA Docket No. 87-35 514,, claim no. C18 309 715, Paul Danko, Jr. was submitted to COVA and placed on that courts docket on 9/24/90, this docket included two final decisions of the BVA the one bearing a final decision date of May 10, 1990, and the other on the multiple service connected disabilities was final on June 21, 1988. On this final decision of BVA the veteran filed an NOD and asked for an appeal to COVA on May 15, 1989, that the VARO received on May 16, 1989 and listed on the record submitted to COVA as a letter to the VA from the Veteran dated May, 1989. This letter which met the requirement of an NOD and was timely filed was in the record submitted to COVA but was not considered.

Under time limits, 38 CFR Chap. l, section 21.7032 (b) (3), the VA admitted to COVA that it had no records of its notification to veteran Danko of the date it notified Danko of its decision, the VA erred here, see Judge Steinberg's Order dated May 13, 1993, "However the record does not indicate which document was viewed by the RO as a valid NOD, nor when such document was filed". (authority: 38 U.S.C. 3031 (d). Pub L 98-525) and 38 C.F.R. section 1.580, Administrative Review (a) (b) and section 1.581 Judiciary Review, (a)(b)(c)(d) (Authority 38 U.S.C. 501) found in Chap l, (7-1-94 Edition, WESTLOCK on DVA, pp. 59-60)

VA did not consider additional evidence received by the agency of original jurisdiction (the Pittsburgh VARO) after the appeal was started. sec. 1937 (a) (authority: 38 U.S.C. 7105 (d) (1)).

The Pittsburgh VARO did not take the proper action on the BVA remand reviewed. RO did not develop the evidence as instructed. See BVA's remand order and remand examination records which was done by RO without any Medical records whatsoever. Sec. 19.38 (authority 38 U.S.C. 7105 (d) (1).). The VARO has been given several requests for a hearing but does not answer to this very date. This is contrary to section 19.50 (a) (authority: 38 USC 7106) and section 19.36, the veteran here was never notified that his records were being transferred to the Military nor was his representative notified. This is the reason why no hearing can be given to this date by the VARO because no records are in the RO and this was the reason for the faulty Remand Medical examination. This is outside of the Law. (authority 38 U.S.C., 7105).

The VA did not maintain Veteran Danko's Medical and Administrative records in the VARO as stated in the COVA court Order per section 1.581 and thus is reason for judicial review of this case, sec 1.581 (a) (b) (c) and (d) as outlined above.and Appendix I.

The VARO did not help to develop Danko's Case when Danko reported that he was granted total disability by the Social Security Administration as per section 3.159 Department of Veterans Affairs Assistance in developing a claim. (a) (b) (c) (authority: 38 U.S.C. 5107) and sec. 3.201 (a) (Authority 38 U.S.C. 501 (a) and section 5105).

No consideration was given to the Veteran under section 3.304 (a) (b) (1)(2)(3) (c).. Direct service connection : wartime and peacetime even though a complete Medical Military Record is in the file, on the contrary VARO showed no mercy or compassion, as "Congress intended to pursue more forthright and Sympathetic Policy", to Veteran Danko on his sickbed. Appendix F.

The VA discriminated along with the U.S. Military that added PAR. 10 AR 601-210 applies to Danko's Honorable Discharge D.D. Form 214, item 32 Remarks. The Army did a "white out" several years ago to remove this unconstitutional Army Regulation. However both the Military and the VARO act as if this item still controls the Veteran's rights, and still do discriminate against this individual, and deny his Constitutional rights. See Appendix K. This may be the reason why the VA and Army show no compassion whatsoever to this gravely ill veteran or give the benefit of the doubt to this veteran as Congress intended in Title 38 U.S.C and all the code of Federal regulations thereto, as related to Pensions, Bonuses and this Veteran's Relief, notwithstanding the Veteran's Family. Appendix F.

The Social Security Administration Disability Award dating back to 1979 from an Administrative Judge in Pittsburgh (this award is part of the VA record and this instant case record) for a well established Service Connected Nervous Condition rated only 50% by the VA is a typically example of no mercy or compassion shown by either the VA or the Army in their manifold reviews in this instant case. This created untold hardship on the family of Veteran Danko, disabled wife and child, i.e. while both Danko and wife were both permanently and totally disabled, they had to pay for their child's education at Duquesne University; had the VA acted with Mercy and Compassion on Veterans Disability Claim for unemployability in 1979, the date that the Veteran ceased to be able to work because of his manifold service connected disabilities in this case, and exactly similar to and in the same frame as COVA case (In Re: Willard B. Bratusch, BVA Docket # 90-26 396, COVA Docket # 91-46, Opinion issued on December, 1991 by the VA office of the General Council analyzing the Veteran's case on the issue of unemployability was not considered by the VA. General Counsel found that the VA use of the term "unemployability" and VA's

Regulations concerning the ability to "secure and follow a substantially gainful occupation " were the same. Moreover, the General Counsel concluded that "unemployability" relies on a subjective Veteran by Veteran analysis, rather than the objective, average person approach. See Appendix O, and 38 C.F. R. Chap. 1, 3.340 (a) (2) (3) (i) (ii) (iii) (b).

BVA Findings and Decision Docket No. 80-08 474, dated August 1, 1980, had a timely NOD and Veteran Danko continually refiled the motion and timely NODs with the Pittsburgh Regional Office until the present day THE ISSUE: " Entitlement to a Total Compensation rating based upon Individual Unemployability".Note this Docket in this instant case under Title 38 U.S.C. gives any Court over BVA the opportunity to upset the DECISION: The appeal is Denied. Under "FINDINGS OF FACT: 1. The Veteran has had a College Education, considerable employment experience as a High School Classroom teacher, and reports that he last worked in 1979, when he voluntarily left his duties in the classroom." The above phrase "he voluntarily left his duties" is an absolute falsehood. The Veteran was so ill that he could not work. After some time an Arbitrator found that the Veteran was so gravely ill that it warranted a Leave of Absence and that he did not abandon his duties voluntarily but on the contrary was gravely ill by Medical Certification and Examination. All of which directly led to total and permanent disability under the Social Security Act which the VA recorded into this very record which remains on NOD with the RO in this instant case. This entire case in its entirety credence to the deception by the VARO adjudicator W.F. BYRNES, Adjudication Officer, Pittsburgh R.O, 38 C.F.R. Chap. 1, section 3.201 (a) (b) (Authority: 38 U.S.C. 5105 < 38 U.S.C.A sec. 5105 >) (26 FR 1571, Feb. 24, 61).

If the VA denies along with the Army that the record from U.S. Madigan General Hospital, Tacoma Washington, from September 29, 1961 and up to Discharge date 24 Jan. 1962, do not contain highly classified information, i.e. Clinical Record, Medical Narrative Summary dated 30 Oct. 61 under Register No. 6116 032 Signed by Captain F. Z. Miklewski, M.C., a copy of this document will demonstrate that it is a breach of National Security by its Contents. This Document is in the VA file at the VA Medical Center and Hospital, at Highland Drive, Pittsburgh, PA and belongs under RO administrative Jurisdiction. See Appendix D pages A 43 to 46. As stated, this document should never be released and this Court can ORDER this Claim File C 18 309-715 of Veteran Danko closed and sealed forever or destroyed as called for in the Motion of Paul Danko, Jr. to the Chairman of the Board of Veteran Appeals dated July 11, 1995 as set forth herein.

CONCLUSION

For the reasons set forth above, an Extraordinary Writ of Certiorari authorized by 28 U.S.C. sec. 1651 (a) must issue to review the Judgment and Opinion of the Court of Appeals for the Federal Circuit in this matter and act on the exceptional circumstances of National Security warranting the exercise of this Courts discretionary powers and note that adequate relief cannot be obtained in any other forum or from any other Court that would be both fair and just for both the U.S. Government and the Veteran and his family and also to the National Security of the United States of America.

Dated: August 10, 1995

Respectfully Submitted,

Morley M. Azorsky, Esquire
Attorney for Petitioner
415 Victoria Street
Belle Vernon, PA 15012
(412) 929-5596

APPENDIX A

Opinion of the United States Court of Appeals for the Federal Circuit No. 94-7022, Dated May 8, 1995

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 94-7022

PAUL DANKO, JR.,
Claimant-Appellant,

v.

JESSE BROWN,
Secretary of Veterans Affairs,
Respondent-Appellee.

ON MOTION

Before ARCHER, *Chief Judge,* FRIEDMAN, *Senior Circuit Judge,* and BRYSON, *Circuit Judge.*

BRYSON, *Circuit Judge.*

ORDER

The Secretary of Veterans Affairs moves for a summary affirmance of the Court of Veterans Appeals' judgment dismissing Paul Danko, Jr.'s appeal for lack of jurisdiction. Danko has not responded.

In September 1985, the regional office denied Danko's claims for increased compensation for various service-connected disabilities, including his left-shoulder disability. More than one year later, on October 15, 1986, Danko submitted a letter to the regional office that expressed his disagreement with the denial of increased compensation. The regional office again denied Danko's claims and issued a statement of the case. On September 30, 1987, Danko filed a VA Form 1-9 whereon he stated that he disagreed with the regional office's findings and that he sought a hearing before the Board of Veterans Appeals. The Board of Veterans Appeals remanded for further adjudication Danko's claim for entitlement to an increased evaluation for his left-shoulder disability.

Ultimately, on May 10, 1990, the Board of Veterans Appeals denied Danko's claim. Danko appealed. The Court of Veterans Appeals dismissed Danko's appeal for lack of jurisdiction because he had not filed a jurisdictionally valid Notice of Disagreement (NOD) on or about November 18, 1988. *See* 38 U.S.C. §7105 Note. The Court of Veterans Appeals noted that even if the October 1986 letter was not a valid NOD because it was not filed with the regional office within one year of the 1985 decision, the form filed by Danko on September 30, 1987 met the statutory and regulatory requirements for a NOD and placed Danko's claim in appellate status. Danko appealed to this court.

This court stayed Danko's appeal pending our decision in *Hamilton v. Brown*, nos. 93-7090, -7091. In *Hamilton*, we affirmed the Court of Veterans Appeals' holding that the veterans court does not have jurisdiction if the NOD that initiated Board review was filed before November 18, 1988. *Hamilton v. Brown*, 39 F.3d 1574 (Fed. Cir. 1994). *See* 38 U.S.C. §7105 Note.

The Secretary argues that the Court of Veterans Appeals' decision that it had no jurisdiction over Danko's appeal should be summarily affirmed based on our holding in *Hamilton*. We agree. Summary disposition of a case "is appropriate, *inter alia*, when the position of one party is so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists." *Joshua v. United States*, 17 F.3d 378, 380 (Fed. Cir. 1994). In the present case, it is clear that summary disposition is warranted. This case involves the same issue that was presented in *Hamilton*. As in *Hamilton*, the Court of Veterans Appeals had no jurisdiction because the NOD that initiated Board review was filed before November 18, 1988. Further, Danko does not object to the motion for summary affirmance.

Accordingly,

IT IS ORDERED THAT:

(1) The Secretary's motion for summary affirmance is granted.

(2) Each side shall bear its own costs.

FOR THE COURT

s/ WILLIAM C. BRYSON
William C. Bryson
Circuit Judge

May 8, 1995
Date

cc: Susan Paczak, Esq.
Deborah A. Bynum, Esq.

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT
MAY 8 1995
FRANCIS X. GINDHART
CLERK

APPENDIX B

Order of the United States Court of Veterans Appeals No. 90-911, Dated May 13, 1993

UNITED STATES COURT OF VETERANS APPEALS

No. 90-911

PAUL DANKO, JR.,

Appellant,

v.

JESSE BROWN,
Secretary of Veterans Affairs,

Appellee.

VA File No. 18 309 715

Before STEINBERG, *Associate Judge.*

ORDER

Note: This single-judge action is of no precedential value See Bethea v. Derwinski, 2 Vet.App. 252, 254 (1992).

Appellant appeals from a May 10, 1990, decision of the Board of Veterans' Appeals (BVA or Board) denying entitlement to an increased rating for a service-connected left-shoulder disability (separation, left acromioclavicular joint), currently rated as noncompensable. The Secretary of Veterans Affairs (Secretary) has filed a motion for remand to the BVA, confessing that the Board

apparently erred in basing its evaluation of appellant's disability in part upon a September 1989 VA report of examination of appellant's wife, rather than appellant. The record before the Court raises significant questions as to whether this Court has jurisdiction over the appealed claim.

In order for this Court to have jurisdiction over a claim on appeal from an adverse BVA decision, a claimant or his or her representative must have filed with a Department of Veterans Affairs (VA) regional office (RO) a valid Notice of Disagreement (NOD) with respect to that claim on or after November 18, 1988. Veterans' Judicial Review Act (VJRA), Pub. L. No. 100-687, §402, 102 Stat. 4105, 4122 (1988) (found at 38 U.S.C.A. §7252(a) Note (West 1991)); *see Hamilton v. Brown*, _____ Vet.App. _____, _____, No. 90-470, slip op. at 3-4 (U.S. Vet. App. Apr. 15, 1993) (en banc). In *Hamilton*, the Court overruled *Whitt v. Derwinski*, 1 Vet.App. 40 (1990), *mot. for review en banc denied*, 1 Vet.App. 94 (1990), *rev'd.* No. 92-7017 (Fed. Cir. July 31, 1992), and held that "[t]here can be only one valid NOD as to a particular claim until a *final* RO or BVA decision has been rendered in that matter, or the appeal has been withdrawn by the claimant." *Hamilton*, _____ Vet.App. at _____, slip op. at 16 (emphasis in original). A BVA remand "is in the nature of a preliminary order and does not constitute a final Board decision." 38 C.F.R. §20.1101(b) (1992). Consequently, RO adjudicative action as to a claim denied by the RO, appealed to the BVA, and then remanded from the BVA to the RO "generally could not give rise to an additional NOD as to that claim for purposes of [38 U.S.C.A. §7105 (West 1991)] and VJRA §402." *Hamilton*, _____ Vet.App. at _____, slip op. at 15.

An NOD is "[a] written communication from a claimant or his or her representative expressing dissatisfaction or disagreement with an adjudicative determination by the [RO] and a desire to contest the result". 38 C.F.R. §20.201 (1992). To be valid, an NOD must have been filed with the RO by the claimant or his or her representative within "one year from the date of mailing of notice of the result of initial review and determination" made by the RO. 38 U.S.C.A. §7105(b)(1) (West 1991).

In the instant case, the VARO on September 10, 1985, denied the veteran's claims for increased compensation for several service-connected disabilities, including his left-shoulder disability. R. at 24-26. The record does not indicate when notice of that decision was mailed to the veteran. On January 16, 1986, the veteran filed with the RO a letter requesting increased ratings for his service-connected disabilities. Preliminary Record (P.R.), exh. 4 (filed Apr. 15, 1991). The veteran on October 15, 1986, filed with the VARO a letter stated to be in reference to an "appeal for all service connected claims", in which he expressed disagreement with the RO decisions on his "last claim for compensation increase" and requested a hearing, P.R., exh. 2. Neither the preliminary record nor the record reflects any RO adjudications subsequent to the September 10, 1985, adjudication and prior to the veteran's October 15, 1986, letter.

In January 1987, the veteran appeared at the RO at a personal hearing, which the RO stated was held "on appeal to the [BVA]". R. at 38. The RO again denied the veteran's claims in a February 26, 1987, confirmed rating decision (R. at 57), and on March 2, 1987, issued a Statement of the Case (SOC) informing the veteran, inter

alia, that he had filed an NOD, but not stating the date of the NOD (R. at 58). On September 30, 1987, the veteran filed a VA Form 1-9 (Appeal to BVA), expressing disagreement with the February 26, 1987, RO decision and requesting a hearing before the BVA. R. at 69. That hearing was held in May 1988. R. at 93. On June 21, 1988, the BVA remanded to the RO, for further development, the veteran's claim for an increased rating for his left-shoulder disability. R. at 94-96. After conducting the additional development on remand, the RO in August 1989 issued a confirmed rating decision and a Supplemental SOC (SSOC). R. at 123-24. In September 1989, the veteran filed another VA Form 1-9, expressing disagreement with the August 1989 SSOC and requesting a hearing before the RO. R. at 132. That document could have constituted a valid NOD under the now-overruled holding in *Whitt, supra*. The veteran appeared at a hearing before the RO in October 1989 (R. at 138), and the RO again denied the claim in November 1989 (R. at 152).

Under this Court's opinion in *Hamilton, supra*, the veteran could not have filed an additional valid NOD as to the left-shoulder claim on or after November 18, 1988, so as to give this Court jurisdiction over that claim under VJRA §402, unless the claim had been the subject of a final BVA decision or had been withdrawn. In this regard, the Court notes that the June 21, 1988, BVA remand was not a final decision on the veteran's appeal and, therefore, that the veteran could not have filed an additional valid NOD with respect to the RO adjudications of his claim pursuant to that remand. However, the record does not indicate which document was viewed by the RO as a valid NOD, nor when such document was filed. Although the veteran's October 1986 letter referring to his "appeal for all service

connected claims" expresses disagreement with and a desire for review of an RO decision on his claims for increased ratings, neither the preliminary record nor the record reveals whether that document was filed within "one year from the date of mailing of notice of the result of initial review and determination" made by the RO. 38 U.S.C.A. §7105(b)(1) (West 1991). If a valid NOD had not previously been filed with respect to the veteran's left-shoulder claim, the veteran's September 30, 1987, VA Form 1-9 could be construed as a valid NOD with respect to the February 26, 1987, RO decision under 38 U.S.C.A. §7105(b) and 38 C.F.R. §20.201. However, it could not satisfy VJRA §402.

On consideration of the foregoing, it is

ORDERED that the Secretary, within 30 days after the date of this order, file a memorandum on whether, pursuant to the Court's opinion in *Hamilton, supra*, this Court has jurisdiction over this appeal under VJRA §402. The Secretary's response shall include copies of all documents not currently in the preliminary record or record which are pertinent to this jurisdictional matter. *See Stokes v. Derwinski*, 1 Vet.App. 201, 203 (1991) (in determining whether a claimant filed a valid VJRA §402 NOD, Court may consider evidence of jurisdictional facts which were not before BVA and, hence, were not part of record on appeal). It is further

ORDERED that appellant, within 30 days after the date of service of the Secretary's memorandum, show cause why the Court should not dismiss his appeal for lack of jurisdiction.

DATED: MAY 13 1993

BY THE COURT:

s/ JONATHAN R. STEINBERG
Jonathan R. Steinberg
Associate Judge

Copies to:

Kenneth R. Behrend, Esq.
2400 Grant Building
Pittsburgh, PA 15219

General County (027)
Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420

APPENDIX C

Order of the United States Court of Veterans Appeals No. 90-911, Dated August 26, 1993

UNITED STATES COURT OF
VETERANS APPEALS

Designated for publication

No. 90-911

PAUL DANKO, JR.,

Appellant,

v.

JESSE BROWN,
Secretary of Veterans Affairs,

Appellee.

Before STEINBERG, *Judge.*

ORDER

Note: This single-judge action carries no precedential weight in other cases. See Bethea v. Derwinski, 2 Vet.App. 252, 254 (1992)

Appellant appeals from a May 10, 1990, decision of the Board of Veterans' Appeals (BVA or Board) denying entitlement to an increased rating for a service-connected left-shoulder disability (separation, left acromioclavicular joint), currently rated as noncompensable. In a May 13, 1993, order, the Court, sua sponte, raised a question as to whether it had jurisdiction over the appeal. *See Zevalkink v. Brown,* _____ Vet.App. _____, _____ No. 91-1683, slip op. at 5 (Aug. 17, 1993) (whether or not parties raise the issue, "the Court must first determine whether it has jurisdiction over the appealed claims");

Noll v. Brown, 5 Vet.App. 80, 82 (1993) (same); *Skinner v. Derwinski*, 1 Vet.App. 2, 3 (1990) ("counts may not in any case, even in the interest of justice, extend their jurisdiction where none exists"). The Court ordered the Secretary of Veterans Affairs (Secretary), within thirty days after the date of that order, to file a memorandum and supplemental record addressing the jurisdictional issue and ordered appellant, within thirty days thereafter, to show cause why the appeal should not be dismissed. On June 14, 1993, the Secretary filed the memorandum and supplemental record and also filed a motion to dismiss the appeal for lack of jurisdiction. On July 19, 1993, appellant filed a reply to the Court's order and the Secretary's motion to dismiss.

In order for this Court to have jurisdiction over a claim on appeal from an adverse BVA decision, a claimant or his or her representative must have filed with a Department of Veterans Affairs (VA) regional office (RO) a valid Notice of Disagreement (NOD) with respect to that claim on or after November 18, 1988. Veterans' Judicial Review Act, Pub. L. No. 100-687, §402, 102 Stat. 4105, 4122 (1988) (found at 38 U.S.C.A. §7251 note (West 1991)) (VJRA §402); *see Hamilton v. Brown*, 4 Vet.App. 528, 531 (1993) (en banc). In *Hamilton*, the Court overruled *Whitt v. Derwinski*, 1 Vet.App. 40 (1990), and held that "[t]here can be only one valid NOD as to a particular claim until a *final* RO or BVA decision has been rendered in that matter, or the appeal has been withdrawn by the claimant." *Hamilton*, 4 Vet.App. at 538. A BVA remand "is in the nature of a preliminary order and does not constitute a final Board decision." 38 C.F.R. §20.1101(b) (1992). Therefore, where a claim is in "appellate status" by virtue of a previously filed NOD, the claimant may not file an additional NOD as to that claim. *Hamilton*, 4 Vet.App. at 541.

An NOD is "[a] written communication from a claimant or his or her representative expressing dissatisfaction or disagreement with an adjudicative determination by the [RO] and a desire to contest the result". 38 C.F.R. §20.201 (1992). To be valid, an NOD must have been filed with the RO by the claimant or representative within "one year from the date of mailing of notice of the result of initial review and determination" made by the RO. 38 U.S.C.A. §7105(b)(1) (West 1991).

In the instant case, the VARO on September 10, 1985, denied the veteran's claims for increased compensation for several service-connected disabilities, including his left-shoulder disability. R. at 24-26. In his June 1993 memorandum, the Secretary states that there is no evidence in the veteran's claims file indicating if or when notice of that decision was mailed to the veteran. The veteran on October 15, 1986, filed with the RO a letter, which he stated was in reference to an "appeal for all service connected claims", and in which he expressed disagreement with the RO decisions on his "last claim for compensation increase" and requested a hearing. Prelim. R., ex. 2. Neither the preliminary record nor the record reflects any RO adjudications subsequent to the September 10, 1985, adjudication and prior to the veteran's October 15, 1986, letter, received by the RO more than a year later.

In January 1987, the veteran appeared at the RO at a personal hearing, which the RO stated was held "on appeal to the [BVA]". R. at 38. The RO again denied the veteran's claims in a February 26, 1987, confirmed rating decision (R. at 57), and on March 2, 1987, issued a Statement of the Case (SOC) informing the veteran, inter alia, that he had filed an NOD, but not stating the date of the NOD (R. at 58-65). On September 30, 1987, the

veteran filed a VA Form 1-9 (Appeal to BVA), expressing disagreement with the March 2, 1987, SOC informing him of the February 26, 1987, RO decision, and requesting a hearing before the BVA. R. at 69. That hearing was held in May 1988. R. at 93. On June 21, 1988, the BVA remanded to the RO, for further development, the veteran's claim for an increased rating for his left-shoulder disability. R. at 94-96. After conducting the additional development on remand, the RO in August 1989 issued a confirmed rating decision and a Supplemental SOC (SSOC). R. at 123-29. In September 1989, the veteran filed another VA Form 1-9, expressing disagreement with the August 1989 SSOC and requesting a hearing before the RO. R. at 132.

In his June 14, 1993, memorandum, the Secretary states that "[w]hile . . . it is not particularly clear what document was viewed by the RO as an NOD to the September 1985 rating decision, the case was clearly in appellate status before March 1987, and probably at the time of the January 1987 hearing." Mem. at 5. In his July 19, 1993, reply, appellant asserts that he filed valid NODs on May 15, 1989 (a letter to the RO expressing disagreement with the June 21, 1988, BVA remand decision), and August 31, 1990 (a Notice of Appeal to this Court from the May 10, 1990, BVA decision denying the claim). Resp. at 3, ex. D, E.

If the veteran had, as the Secretary asserts, filed a valid timely NOD as to the left-shoulder claim prior to January or March 1987, such NOD would be insufficient to confer jurisdiction upon this Court under VJRA §402, and the veteran could not have filed another valid NOD as to that claim unless the claim had been the subject of a *final* RO or BVA decision or the prior NOD had been withdrawn. *See Hamilton*, 4 Vet.App. at 538. Although

the January 1987 RO hearing transcript and the March 1987 SOC indicate that the veteran's left-shoulder claim was on appeal at those times, the fact, conceded by the Secretary, that the veteran's VA claims file contains no evidence as to when the veteran was informed of the September 1985 RO decision nor any documents filed with the RO by the veteran within one year after that 1985 decision, leaves this Court with little basis upon which to determine whether a timely NOD was in fact filed with respect to that September 1985 decision. It is not necessary, however, for the Court to make that determination.

If the Court were to conclude that the veteran had not filed a valid NOD with respect to the September 1985 RO denial of his left-shoulder claim, his September 30, 1987, VA Form 1-9 (R. at 69) would in that event constitute a valid NOD so as to place the left-shoulder claim in appellate status for purposes of review by the Board. Because the veteran filed that document with the RO within one year after the February 1987 RO decision denying his left-shoulder claim (R. at 57) and that document expresses disagreement with and a desire to appeal that decision to the BVA, it meets the statutory and regulatory requirements for an NOD. *See* 38 U.S.C.A. §7105(b); 38 C.F.R. §20.201; *see Zevalkink*, _____ Vet.App. at _____, slip op. at 7 (concluding that holding in *Malgapo v. Derwinski*, 1 Vet.App. 397, 398-99 (1991), that VA Form 1-9 can be valid NOD was implicitly reaffirmed by the en banc Court in *Hamilton*, 4 Vet.App. at 538, as long as a prior NOD had not been filed as to the particular claim). Because that document was filed prior to November 18, 1988, it would be insufficient, if it were a valid NOD, to give this Court jurisdiction over that claim on appeal from the BVA.

Neither of the documents relied on by appellant as NODs—the May 15, 1989, letter to the RO expressing disagreement with the June 21, 1988, BVA remand decision, nor the August 31, 1990, Notice of Appeal to this Court from the May 10, 1990, BVA decision—may constitute valid NODs as to the left-shoulder claim under *Hamilton* because that claim was already on appeal by virtue of a prior NOD. The same is the case as to the September 1989 VA Form 1-9. Furthermore, neither of the former two documents could be a valid NOD under 38 U.S.C.A. §7105(b)(1) and 38 C.F.R. §20.201, because those documents express disagreement with determinations of the BVA rather than the RO.

The Court holds, therefore, that the veteran's NOD as to his left-shoulder claim was filed prior to November 18, 1988, and that the Court is thus without jurisdiction to review the May 10, 1990, BVA decision denying that claim. *See Hamilton, supra.*

On consideration of the foregoing, it is

ORDERED that the Secretary's motion to dismiss is granted and the appeal is dismissed for lack of jurisdiction.

DATED: AUG 26 1993

BY THE COURT:

s/ JONATHAN R. STEINBERG
JONATHAN R. STEINBERG
Judge

Copies to:

Kenneth R. Behrend, Esq.
2400 Grant Building
Pittsburgh, PA 15219

General Counsel (027)
Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420

APPENDIX C-1

Order of the United States Court of Veterans Appeals No. 90-911, Dated June 11, 1992

UNITED STATES COURT OF
VETERANS APPEALS

No. 90-911

PAUL DANKO, JR.,

Appellant,

v.

EDWARD J. DERWINSKI,
Secretary of Veterans Affairs,

Appellee.

VA File No. C 18 309 715

Before STEINBERG, *Associate Judge.*

ORDER

On October 30, 1991, the Court issued an order stating that further motions by the Secretary of Veterans Affairs (Secretary) for an extension of time will not be granted unless agreed to by appellant's counsel or supported by extraordinary circumstances. On May 1, 1992, the Court received appellant's brief. On June 1, 1992, the Secretary filed a motion for a 10-day extension of time until June 11, 1992, to file a response to appellant's brief, asserting as grounds for the motion that the Secretary's counsel needed additional time to

prepare a responsive pleading regarding the possibility of remand and that "certain medical records may have erroneously been considered when the Board of Veterans' Appeals [(BVA)] rendered a decision in the . . . case." Appellee's Mot. at 1. The Secretary's counsel stated that he was unable to contact appellant's counsel concerning said motion.

It appears that appellant's brief was filed by a Kenneth R. Behrend, Esq., who informs the Court that appellant's previous counsel, Lawrence N. Paper, Esq., is unwilling to proceed any further with this matter, and advised appellant to secure new counsel.

On consideration of the foregoing and that (1) counsel Paper has not filed a Notice of Withdrawal, and (2) counsel Behrend has not filed a Notice of Appearance, it is

ORDERED that Lawrence N. Paper, within 20 days after the date of this order, file with the Clerk of the Court a Notice of Withdrawal of his representation for appellant. It is further

ORDERED that Kenneth R. Behrend, within 20 days after the date of this order, file with the Clerk of the Court (1) a Notice of Appearance with good cause shown, see U.S. Vet. App. R. 46(c), and (2) a Fee Agreement. It is further

ORDERED that the Secretary's motion for an extension of time until June 11, 1992, to file a response to appellant's brief is granted, given the unusual circumstances asserted in appellant's brief regarding several BVA decisions, five disabilities, and two files. The Secretary shall file a response not later than June 11, 1992. No further extensions will be granted to either party in this case.

DATED: JUN 11 1992

BY THE COURT:

s/ JONATHAN R. STEINBERG
JONATHAN R. STEINBERG
Associate Judge

Copies to:

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Pittsburgh, PA 15219

Kenneth R. Behrend, Esq.
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Pittsburgh, PA 15219

General Counsel (027)
Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420

khs

APPENDIX D

Memorandum of Consideration of the Board for Correction of Military Records of the Department of the Army Docket No. AC89-05566D, Dated June 7, 1995

(SEAL) (SEAL)

DEPARTMENT OF THE ARMY
BOARD FOR CORRECTION OF MILITARY RECORDS
1941 JEFFERSON DAVIS HIGHWAY, 2ND FLOOR
ARLINGTON, VA 22202-4508

SFMR-RBR 7 JUN 1995
DANKO, PAUL, JR.
169-26-7266

Mr. Paul Danko, Jr.
415 Victoria Street
Bell Vernon, Pennsylvania 15012

Dear Mr. Danko:

This is in reply to your request for reconsideration of your earlier application which was denied due to your failure to timely file.

Your request, the new information you provided, and your available records were submitted to the Board to determine if there was sufficient justification to conclude that your application was filed within the time required, or if not, whether it would be in the interest of justice to excuse your failure to timly file. The Board determined that the new information and new contentions submitted with your request did not warrant a reversal of its earlier decision. Enclosed is a copy of the Memorandum of Consideration reaffirming the Board's original decision.

Sincerely,

s/ DAVID R. KINNEER
David R. Kinneer
Executive Secretary

Enclosure
CF:
Honorable Arlin Specter

(SEAL) (SEAL)

DEPARTMENT OF THE ARMY
BOARD FOR CORRECTION OF MILITARY RECORDS
1941 JEFFERSON DAVIS HIGHWAY, 2ND FLOOR
ARLINGTON, VA 22202-4508

MEMORANDUM OF CONSIDERATION

IN THE CASE OF: DANKO, PAUL
169-26-7266

BOARD DATE: 31 May 1995
DOCKET NUMBER: AC89-05566D

I certify that hereinafter is recorded the record of consideration of the Army Board for Correction of Military Records in the case of the above-named individual. The following members, a quorum, were present:

Mr. John N. Slone	Chairperson
Mr. Gary W. Meyer	Member
Mr. Raymond V. O'Connor, Jr.	Member

Also present, without vote, were:

Mr. David R. Kinneer	Executive Secretary
Mr. Richard H. Allen	Examiner

The Board, established pursuant to authority contained in Title 10, United States Code, section 1552, convened at the call of the Chairperson on the above date. In accordance with Army Regulation 15-185, the application and the available military records pertinent to the corrective action requested were reviewed to determine whether the application was filed within the time established by statute, and if not, whether it would be in the interest of justice to waive the failure to timely file.

The applicant requests correction of military records as stated in the application to the Board and as restated herein.

The Board considered the following evidence:

Exhibit A—Application for correction of military records
Exhibit B—Military Personnel Records (including advisory opinion, if any)

APPLICANT REQUESTS: That the Board reverse its previous action which denied his application for failure to timely apply, and consider the merits of the application. The applicant contends that the Executive Secretary of the Board (and by inference, the Board) are not handling his case fairly. He makes reference to a 40-page document of disagreement (COPY ATTACHED), dated 14 February 1991, which he submitted through his United States Senator at the time, in appeal to the original decision of the Board (COPY ATTACHED) on 7 March 1990. He also sent copies of this appeal to the Attorney General of the United States, and the matter has also been reviewed by the Inspector General, Department of the Army. Essentially, the Attorney General referred the matter to the Army, and the Inspector General found that this Board is the appropriate forum for his appeal.

PURPOSE: To determine if the new information and/or contentions now submitted by the applicant, when added to the information already available, contains sufficient justification to conclude that the application was filed within the time required, or if not, whether it could be in the interest of justice to excuse the applicant's failure to file his original application which had been denied by the Board.

NEW EVIDENCE OR INFORMATION: In support of the current request, the applicant has submitted the 40-page document identified above. He also has submitted essentially the same document through another United States Senator. In addition, the Board has obtained copies of his Department of Veterans Affairs (VA) records, current through January 1994.

Essentially, in his 40-page appeal, the applicant claims he should have been, as a minimum, placed on the Temporary Disability Retired List (TDRL) at the time of his honorable discharge from the Army on 24 January 1962, by reason of physical disability, with 10 percent severance pay. Subsequently, he should have been medically retired from the Army as 100 percent disabled. He disagrees with various statements made by the Board in its prior decisional document, subsequent correspondence with his attorney, and with entries made on Army medical documents, or the decisions made at the time of his hospitalization at Madigan General Hospital and the final separation/rating determinations at Valley Forge Army General Hospital in 1961 and 1962.

The original Board decisional document stated that the applicant was admitted to Madigan Army General Hospital on 30 October 1961. In fact, he was admitted on 29 September 1961.

VA medical records show that the applicant was medically evaluated by the VA on 27 September 1962 and was assigned a 30 percent disability rating for a service connected psychoneurosis, anxiety reaction condition effective 25 January 1962, the day after his discharge. He was given zero percent disability ratings for service connected conditions consisting of prostatitis; dishidrotic eczema with folliculitis (previously diagnosed

as neurodermatitis); herniorrhapy scar, right; fracture, left middle finger; separation acromioclavicular junction, left; and, tonsillectomy. He was not rated on glossitis and amebiasis, which were not considered service connected.

On 3 June 1963, the VA changed the rating and diagnosis for his nervous condition to 50 percent disabled for schizophrenic reaction, paranoid, competent from 25 January 1962. This was reaffirmed in December 1963.

On 1 April 1965, he was denied a rating by the VA for an esophageal hiatal hernia. On 24 May 1973, the 50 percent disability rating for the schizophrenic reaction was continued. Zero percent disability ratings were continued for the same six other medical conditions as outlined above. Besides reaffirming the non-service connection of the two conditions mentioned above, he was also not rated for two other non-service connected conditions of esophageal hiatal hernia and rheumatoid arthritis. Essentially, these latter two conditions were not claimed within 1 year after release from active duty, nor did he receive treatment for these conditions while on active duty. Several appeals were lodged by the applicant to the ratings for the prostatitis and the arthritic conditions, but appeals were denied by the Board of Veterans Appeals (VA) in the 1975-1977 time frame.

On 14 September 1979, in response to a claim of unemployability because of his schizophrenic condition, his claim was denied by Pittsburgh, Pennsylvania, VA Regional Office (VARO). He had obtained a college degree after his discharge from active duty and had worked as a high school teacher. On 1 August 1980, the BVA found that he was employable. He had voluntarily

left his high school teaching job in April 1979. However, his VA records do contain a document indicating that, as of May 1985, he was medically retired from a Pennsylvania school system.

On 28 April 1987 (and reaffirmed in September 1989), the applicant's claim for increased disability payments because his wife needed aid and attendance was denied by his local VARO.

On 11 June 1988 the BVA denied his appeal for increased ratings for his schizophrenic condition, his prostatitis condition, and residuals from his tonsillectomy. An appeal for an increased rating on his left shoulder condition was remanded for further medical evaluation. After these evaluations, the BVA denied his claim on 10 May 1990 for an increase in the zero percent rating for this condition.

On 26 August 1993, the United States Court of Veterans Appeals denied his appeal of the 1990 BVA decision for an increased rating for his left shoulder condition because the court did not have jurisdiction over properly filed disagreements with BVA decisions.

The Office of the Surgeon General (OTSG), in a comment (COPY ATTACHED) to the Board, opined that the applicant had numerous other complaints and subsequent evaluations that are recorded in his records. They include: prostatitis, tonsillectomy, eczema, hernia repair, and intermittent gastric and upper abdominal pains. There is no indication in the records that these medical conditions interfered with the satisfactory performance of duty. He met the retention standards of Army Regulation 40-501 for his medical conditions, to include his shoulder injury. However, he was found unfit due to his psychiatric condition. The OTSG recommended denial of his application.

The U. S. Army Physical Disability Agency, has again reviewed the applicant's case, and VA records, and has reaffirmed (COPY ATTACHED), that agency's opinion that the applicant was properly rated as 10 percent disabled in 1962.

Neither of these opinions contain any information, advice or recommendations which would constitute a basis for granting the relief requested or for excusing the applicant's failure to timely file on 6 October 1988.

Title 10, United States Code, section 1202, provides for the placement of a member on the Temporary Disability Retired List when the disability may be permanent. Placement on the Temporary Disability Retired List requires that the member meet the criteria of Title 10, United States Code, section 1201.

Title 10, United States Code, section 1203, provides for the physical disability separation of a member who has less than 20 years service and a disability rated at less than 30 percent.

An award of a VA rating does not establish entitlement to medical retirement or separation. The VA is not required to find unfitness for duty. Operating under its own policies and regulations, the VA awards ratings because a medical condition is related to service, i.e., service-connected. Furthermore, the VA can evaluate a veteran throughout his lifetime, adjusting the percentage of disability based upon that agency's examinations and findings. The Army must find unfitness for duty at the time of separation before a member may be medically retired or separated.

DISCUSSION: After considering all the evidence, allegations, and information presented by the applicant with the current request, together with the previously

available evidence of record, the advisory opinion(s), and the applicable law and regulations, the Board again concludes that the applicant has not presented, nor do the records contain, sufficient justification to establish that it would be in the interest of justice to excuse the failure to file within the time prescribed by law.

DETERMINATION: The original determination made by the Board in this case is reaffirmed.

BOARD VOTE:

_____ _____ _____ EXCUSE FAILURE TO TIMELY FILE

_____ _____ _____ GRANT FORMAL HEARING

D R K CONCUR WITH DETERMINATION

s/ RICHARD H. ALLEN
for David R. Kinneer
Executive Secretary

(SEAL) (SEAL)

DEPARTMENT OF THE ARMY
OFFICE OF THE SURGEON GENERAL
5109 LEESBURG PIKE
FALLS CHURCH, VA 22041-3258

REPLY TO
ATTENTION OF

SGPS-CP-B

MEMORANDUM FOR DIRECTOR, MANAGEMENT INFORMATION AND SUPPORT DIRECTORATE, DA MILITARY REVIEW BOARDS AGENCY, ATTN: SFMR-RBS-C, 2ND FLOOR, 1941 JEFFERSON DAVIS HIGHWAY, ARLINGTON, VA 22202-4508

SUBJECT: Advisory Opinion—Danko, Paul Jr., 169-26-7266

1. Correspondence pertaining to the above named ABCMR applicant has been reviewed by The Surgeon General's Chief Surgical (who is a board certified orthopedist) and Medical Consultants.

2. This applicant entered active duty in May 1950 and received an honorable discharge in July 1954. He then entered the USAR and subsequently returned to active duty in May 1958 and was separated in January 1962. He is requesting that his separation with severance pay be changed to medical disability retirement.

3. In 1953, a truck slipped and he injured his left shoulder and finger. The diagnosis was a possible left acromioclavicular joint separation. No surgery was performed. He was issued a "2" under the "U" factor of the profile. The separation examination in 1954 did note arthritis in the shoulder. He was found qualified for

separation. In 1958, when he returned to active duty, the SF 89, Report of Medical History, did not note any problems with his shoulder or arthritis. The profile was all 1's. On 14 October 1959, he was seen in orthopedic clinic where his shoulder was described as having no limitation of motion. There is no separation physical from the second enlistment. There is no indication that he could not perform the duties of his MOS because of physical limitations.

4. On 26 September 1961, he was seen at Madigan General Hospital for a psychiatric condition and was transferred to Valley Forge General Hospital on 6 November 1961. A MEB dated 19 December 1961 determined that he was unfit for continued active duty due to a schizophrenic reaction, improved, in partial remission. He was referred to a PEB. On 21 December 1961, a PEB was held and he was found unfit due to a psychiatric condition. The recommendation was that he be separated with 10% severance pay. The applicant concurred with the findings. In November 1989, the USAPDA (in response for an increase in disability), concluded that he was appropriately rated by the PEB.

5. He had numerous other complaints and subsequent evaluations that are recorded in the chart. They include: prostatitis, tonsillectomy, eczema, hernia repair, and intermittent gastric and upper abdominal pains. There is no indication in the records that these medical conditions interfered with the satisfactory performance of duty.

6. He meet the retention standards of AR 40-501 for his medical conditions, to include his shoulder injury. However, as documented by the MEB, he did not meet the standards due to his psychiatric condition. The MEB appropriately sent the chart to the PEB. The 1989 response from the USAPDA clearly states that the 1961 PEB rated him correctly.

7. Recommend his application be denied. However, another review by USAPDA may be indicated, if deemed appropriate by the ABCMR examiner.

FOR THE SURGEON GENERAL:

s/ DALE A. CARROLL
DALE A. CARROLL
Colonel, MC
Chief, Clinical Policy
Consultants Division

Encl

TAPD-ZB (SFMR-RBS-C/10 Nov 94) (635-40) 1st End
LTC Brower/paj/DNS 291-5068
SUBJECT: Advisory Opinion - DANKO, Paul, Jr., 169-26-7266

Commander, USAPDA, FGS, WRAMC, Wash., DC 20307-5001
17 November 1994

FOR Director, MISD, ATTN: SFMR-RBS-C, 1941 Jefferson Davis Highway, 2d Floor, Arlington, VA 22202-4508

1. This Agency has again reviewed the above referenced case and comments from your 10 Nov 94 memorandum.

2. A review of the Agency's 20 Nov 89 opinion reveals that the case was closely scrutinized, both at the original PEB and for the ABCMR petition. On both occasions there was honest and open discussion as to the level of unfitness at the time of the applicant's separation. Although an argument can be supported for a higher rating that position had been considered several times, and the Agency's final opinion was that at the time of the separation the majority of the medical evidence indicated he was most appropriately rated at 10 percent. A review of the case again, to include the supporting 14 Oct 94 memorandum from The Office of the Surgeon General, reaffirms this Agency's prior opinion that the applicant was properly rated at 10 percent.

3. The fact that the VA rated the applicant higher soon after separation has been considered. The evidence available at the time of the separation of the applicant still supports the 10 percent rating and not an increase.

4. This Agency requests a copy of the final decision in this case.

FOR THE COMMANDER: s/ ALBION A. BERGSTROM
ALBION A. BERGSTROM
COL, AR
Deputy Commander

(SEAL)

DEPARTMENT OF THE ARMY
BOARD FOR CORRECTION OF MILITARY RECORDS
WASHINGTON, D.C. 20310-1803

MEMORANDUM OF CONSIDERATION

IN THE CASE OF: DANKO, PAUL, JR.
169-26-7266

BOARD DATE: 7 March 1990
DOCKET NUMBER: AC89-05566

I certify that hereinafter is recorded the record of consideration of the Army Board for Correction of Military Records in the case of the above-named individual. The following members, a quorum, were present.

Mr. Charles V. Szenas	Chairperson
Mr. John H. Kern	Member
Mr. Matt Reres	Member
Mr. David R. Kinneer	Executive Secretary
Mr. Richard H. Allen	Examiner

The Board, established pursuant to authority contained in Title 10, United States Code, section 1552, convened at the call of the Chairperson on the above date. In accordance with Army Regulation 15-185, the application and the available military records pertinent to the corrective action requested were reviewed to determine whether the application was filed within the time established by statute, and if not, whether it would be in the interest of justice to waive the failure to timely file.

The applicant requests correction of military records as stated in the application to the Board and as restated herein.

The Board considered the following evidence:

Exhibit A—Application for correction of military records
Exhibit B—Military Personnel Records (indicating advisory opinion, if any)

APPLICANT REQUESTS: A change in his physical disability separation, with 10 percent severance pay, to a physical disability retirement, rated at 100 percent disability. He claims he was drugged during the separation process and did not know what papers he was signing. Counsel fully supports the applicant's request, noting that the applicant may not have been in partial remission of his psychiatric condition at the time of separation. Counsel requests the benefit of the doubt be resolved in the applicant's favor.

PURPOSE: To determine whether the application was submitted within the time limit established by law, and if not, whether it is in the interest of justice to excuse the failure to timely file.

EVIDENCE OF RECORD: The applicant's military records show:

He had prior active duty from May 1950 to July 1954, when he was honorably separated as a sergeant (F-5). This was followed by service in the Air Force and Army Reserves. On 7 May 1958, the applicant enlisted again in the Regular Army for 6 years, at age 25, with 14 years formal education. He was trained as an infantry operations and intelligence sergeant. In September 1961, he was reassigned from a tour of duty in Germany to Fort Lewis, Washington.

On 30 October 1961, the applicant was admitted to Madigan General Hospital at Fort Lewis for a

psychiatric condition. He was transferred to Valley Forge General Hospital, Phoenixville, Pennsylvania, on 6 November 1961.

On 19 December 1961, the applicant was evaluated by a Medical Evaluation Board (MEB) at Valley Forge and was found medically unfit for continued active duty due to a schizophrenic reaction, however, the condition was improved and was in partial remission, and that he was mentally competent for pay purposes. He was referred to a Physical Evaluation Board (PEB). The applicant neither agreed nor disagreed with the MEB's findings. On 21 December 1961, a PFP was held and the applicant was found physically unfit for continued duty due to his psychiatric condition. It was recommended that the applicant be separated from active duty with 10 percent severance pay. The applicant, acknowledging a full explanation of the PEB's recommendation and his legal rights, concurred in writing with the PEB's recommendation.

On 19 January 1962, the PEB's recommendation was approved by order of the Secretary of the Army. The applicant was honorably separated on 24 January 1962, by reason of physical disability, with 10 percent disability, and he was paid $3,520.00 severance pay. He was credited with 3 years, 8 months and 18 days active service on this enlistment and was given credit for 5 years, 7 months and 7 days prior active and reserve service.

On 22 November 1967, this Board denied a request by the applicant to waiver his prior discharge with severance pay so that he could reenter the Armed Services.

Title 10, United States Code, section 1203, provides for the physical disability separation of a member who has less than 20 years service and a disability rated at less than 30 percent.

Title 38, United States Code, sections 310 and 331, permits the Veterans Administration to award compensation for disabilities which were incurred in or aggravated by active military service. Furthermore, the Veterans Administration can evaluate a veteran throughout his lifetime, adjusting the percentage of disability based upon that agency's examinations and findings. The Army's finding of unfitness for duty at the time of separation applies to that point in time, not future changes in his condition.

The application is dated 6 October 1988 and the applicant has neither satisfactorily explained the 26-year delay in filing, nor demonstrated, by competent evidence, that waiver of the statute of limitations would be in the interest of justice.

Title 10, United States Code, section 1552(b), provides that applications for correction of military records must be filed before 26 October 1961, or within 3 years after discovery of the alleged error or injustice, whichever is later. Failure to file within 3 years may be excused by a correction board if it finds it would be in the interest of justice to do so.

In the processing of this case, a staff advisory opinion (COPY ATTACHED) was obtained from the Physical Disability Agency. It contains no information, advice or recommendation which would constitute a basis for granting the relief requested or for excusing the applicant's failure to timely file.

DISCUSSION: The alleged error or injustice was, or with reasonable diligence should have been discovered on 26 January 1962, the date of his disability separation. The time for the applicant to file a request for correction of any error or injustice expired on 24 January 1965.

DETERMINATION: The subject application was not submitted within the time required. The applicant has not presented and the records do not contain sufficient justification to conclude that it would be in the interest of justice to grant the relief requested or to excuse the failure to file within the time prescribed by law.

BOARD VOTE:

___	___	___	EXCUSE FAILURE TO TIMELY FILE
___	___	___	GRANT FORMAL HEARING
D	R	K	CONCUR WITH DETERMINATION

s/ RICHARD H. ALLEN
for David R. Kinneer
Executive Secretary

TAPD-PEB-G (TAPD-OEA-TS/4 Aug 89) (AR635-40) 1st END COL McGuire/mm/AV 780-3936/3708
SUBJECT: Advisory Opinion - DANKO, Paul, Jr., 169-26-7266

President, USA Physical Evaluation Board, Ft Gordon, GA 30905-5662, 20 November 1989

THRU COMMANDER, U.S. ARMY PHYSICAL DISABILITY AGENCY, FOREST GLEN SECTION, WALTER REED ARMY MEDICAL CENTER, WASHINGTON, D.C. 20307-5001

FOR OSA, ABCMR, ROOM 1E483, PENTAGON, WASHINGTON, D.C. 20310-1803

1. ISSUE: The PEB has reviewed the attached application in which the applicant requests that his physical disability discharge with severance pay be changed to a physical disability retirement.

2. SIGNIFICANT DATES AND EVENTS:

a. 19 Dec 61 - A Medical Evaluation Board (MEB) was completed with the soldier being diagnosed as having a schizophrenic reaction. The Commander of the Valley Forge General Hospital approved the MEB findings and recommendations on 19 December 1961.

b. 20 Dec 61 - Soldier signed the MEB proceedings acknowledging that he had been informed of the findings and recommendations. However, he neither agreed nor disagreed with the findings nor did he submit a written appeal.

c. 21 Dec 61 - Physical Evaluation Board (PEB) convened and found the soldier physically unfit for disabilities rated at 10%. The PEB recommended

separation from service with severance pay. The medical member of the PEB dissented from the findings and recommendations. The medical member agreed with the psychiatric recommendation pertaining to the degree of disability (considerable impairment of social and industrial adaptability).

d. 21 Dec 61 - The soldier signed a PEB election in which he acknowledged being advised of the PEB findings and recommendations and his legal rights. The solider indicated concurrence with the PEB informal board and waived a formal hearing.

e. 19 Jan 62 - The PEB was approved by order of the Secretary of the Army.

f. 24 Jan 62 - Paragraph 20, Special Orders Number 17, Headquarters Valley Forge General Hospital, Phoenixville, Pennsylvania were published directing the soldier's discharge effective 24 January 1962.

3. DISCUSSION: a. The MEB states that the soldier's schizophrenic condition was in partial remissions, that he was mentally competent for pay purposes, that he was not considered dangerous to himself or others, and that further hospitalization and treatment was not required.

b. The soldier entered the Madigan General Hospital for his condition on about the September 1961 time frame. He was subsequently transferred to the Valley Forge General Hospital in November 1961. The MEB completed at Valley Forge a month and a half after his admission contained comments that as recently as three weeks prior to his MEB he was placed on a closed ward and on medication to calm his disposition. Less than two weeks prior to his MEB the soldier was returned to open ward but with little change to his

disposition. The MEB continues to address the soldier's therapeutic progress but states that he may be "considerably" impaired to adjusting to civilian life. The final diagnosis indicates that the soldier was in partial remission with considerable social and industrial inadaptability.

c. Although specific written policy guidance from 1961 is not currently available a check with the Physical Disability Agency Medical Member supports the assumption that service members with mental disorders could be placed on TDRL if the conditions warranted.

d. The Narrative Summary of the MEB (course in the hospital) describes the soldier's condition as physically unfitting. The fact that he had been initially admitted for these conditions only four months prior to his MEB and that it was necessary to place him in closed ward because of his performance, coupled with his post return to open ward inflammatory attitude, supports the condition that his condition was not stable.

e. Evaluating the soldier's condition as it appeared to exist at the time of the PEB would support a ratable disability of not less than 30% nor more than 50%. As indicated in the MEB, the soldier was financially competent. He was still in the hospital at the time of the MEB. The MEB recommended discharge to the soldier's own custody. The soldier continued to display signs of mental illness at the time of his MEB. Job instability and social maladjustment appear to be addressed by the physician's comment that "it seems likely that he may be considerably impaired in adjusting to civilian life".

f. All of this appears to point toward TDRL at a minimum rating of 30%. However, on 29 December 1961, the Army Physical Review Council (APRC, pecursor to the USAPDA) reviewed the case, considered the

minority report, affirmed the original PEB findings and recommendations, and obviously did not feel that TDRL condition existed. It is assumed that the reviewer on the APRC was also a psychiatrist, and I see no evidence to support the soldier's contention that the PEB and the Surgeon General's consultant (APRC) erred.

4. CONCLUSIONS: The soldier was appropriately rated by the PEB.

5. RECOMMENDATION: That the applicant's request be disapproved, and that the 21 December 1961 PEB be affirmed.

6. Request a copy of the completed action in this case be furnished this PEB.

s/ LOUIS A.K. SYLVESTER
LOUIS A.K. SYLVESTER
COL, IN
PRESIDENT

Encl
nc

10 USC § 1552

APPLICATION FOR CORRECTION OF MILITARY RECORD UNDER THE PROVISIONS OF TITLE 10, U.S. CODE, SECTION 1552

(Please read instructions on reverse side BEFORE completing application.)

Form Approved
OMB No. 0704-0003
Expires Dec 31, 1988

PD/EB

PRIVACY ACT STATEMENT

AUTHORITY: Title 10, U.S. Code 1552, Executive Order 9397, November 22, 1943

PRINCIPAL PURPOSE: To apply for correction of a military record

ROUTINE USES: To docket a case. Reviewed by board members to determine relief sought. To determine qualification to apply to board. To compare facts present with evidence in the record.

DISCLOSURE: Voluntary. If information is not furnished, applicant may not secure benefits from the Board

1. APPLICANT DATA

a. BRANCH OF SERVICE *(X one)*
[X] (1) ARMY [ ] (2) NAVY [ ] (3) AIR FORCE [ ] (4) MARINE CORPS [ ] (5) COAST GUARD

b. NAME *(Last, First, Middle Initial) (Please print)*	c. PRESENT PAYGRADE	d. SERVICE NUMBER *(If applicable)*	e. SOCIAL SECURITY NUMBER
DANKO, PAUL JR.	SGT E-5	RA 13355367	169267266

2. TYPE OF DISCHARGE *(If by court-martial, state type of court.)*	3. PRESENT STATUS, IF ANY, WITH RESPECT TO THE ARMED SERVICES *(Active duty, Retired, Reserve, etc.)*	4. DATE OF DISCHARGE OR RELEASE FROM ACTIVE DUTY
HONORABLE* SEVERANCE	NONE	24 JAN 1962

5. ORGANIZATION AT TIME OF ALLEGED ERROR IN RECORD	6. I DESIRE TO APPEAR BEFORE THE BOARD IN WASHINGTON, D.C. *(No expense to the Government)* *(X one)*
VALLEY FORGE GH PHOENIXVILLE PA.	[X] a. YES [ ] b. NO

7. COUNSEL *(If any)*

a. NAME *(Last, First, Middle Initial)*	b. ADDRESS *(Street, City, State and Zip Code)*
VFW	1000 Liberty Ave, Federal Bldg, Pgh., Pa.

8. I REQUEST THE FOLLOWING CORRECTION OF ERROR OR INJUSTICE: Complete Review of Medical Discharge dated 24 Jan 1662, HONORABLE, SEVERANCE (INJUSTICE)

9. I BELIEVE THE RECORD TO BE IN ERROR OR UNJUST IN THE FOLLOWING PARTICULARS: DA Form signed under duress dated 21 Dec 1961, without counsel and fear for life, at Valley Forge Hosp. Hospitalized against will, druggedlife endangered, health severly damaged when ordered to Madigan General Hospital on 29 Sept, 1961 by the 115th INTC Group, Ft. Lewis, Washington. Note; Druggedwhile hospitalized and at time of Discharge and signing of all discharge forms and other documents.

10. IN SUPPORT OF THIS APPLICATION I SUBMIT AS EVIDENCE THE FOLLOWING: *(If Veterans Administration records are pertinent to your case, give Regional Office location and Claim Number.)* VA Regional Office, 1000 Liberty Ave., Federal Bldg., Pgh., Pa. 15222

Hospital Clinical Records: Madigan General Hospital, Tacoma, Wash., 29 Sept., 61 and Valley Forge Gen. Hospital, Phoenixville, Pa. , 6 Nov., 61 to 24 Jan., 62.

11. ALLEGED ERROR OR INJUSTICE DATA

a. DATE OF DISCOVERY of records, May 24, 1988 at VA, Board of Veterans Appeals, Wash. DC

b. IF MORE THAN THREE YEARS SINCE THE ALLEGED ERROR OR INJUSTICE WAS DISCOVERED, STATE WHY THE BOARD SHOULD FIND IT IN THE INTEREST OF JUSTICE TO CONSIDER THIS APPLICATION. NONE

12. APPLICANT MUST SIGN IN ITEM 16. IF THE RECORD IN QUESTION IS THAT OF A DECEASED OR INCOMPETENT PERSON, LEGAL PROOF OF DEATH OR INCOMPETENCY MUST ACCOMPANY APPLICATION. IF APPLICATION IS SIGNED BY OTHER THAN APPLICANT, INDICATE RELATIONSHIP OR STATUS BY MARKING APPROPRIATE BOX. NONE

[ ] a. SPOUSE [ ] b. WIDOW [ ] c. WIDOWER [ ] d. NEXT OF KIN [ ] e. LEGAL REP [ ] f. OTHER *(Specify)*

13. I MAKE THE FOREGOING STATEMENTS, AS PART OF MY CLAIM, WITH FULL KNOWLEDGE OF THE PENALTIES INVOLVED FOR WILLFULLY MAKING A FALSE STATEMENT OR CLAIM. *(U.S. Code, Title 18, Sec. 287, 1001, provides a penalty of not more than $10,000 fine or not more than 5 years imprisonment or both.)*

14. COMPLETE CURRENT ADDRESS, INCLUDING ZIP CODE *(Applicant should forward notification of all changes of address.)*	DOCUMENT NUMBER *(Do not write in this space.)*
415 Victoria St., Belle Vernon, Pa. 15012	AC-89-05566

15. DATE SIGNED	16. SIGNATURE *(Applicant must sign here.)*
Oct. 6, 1988	Paul Danko Jr. Paul Danko Jr.

DD Form 149, FEB 86 *Previous editions are obsolete*

Note: Not one of his Rejection is Reviewed.

A41

Paul Danko Jr
415 Victoria St
Belle Vernon, PA. 15012

Department of the Army
Military Review Boards Agency

July 7, 1989

HCDA, MRBA

ATTN. SFMR-RBS-C (CPSD)
Washington, DC 20310-1805

Subject: Correction of Military Records—DD Form 149, dated Oct.6,88, Sgt. Paul Danko, Jr., RA 13355367, SS#169 26 7266

Dear Sir,

With reference to your letter dated June 9, 1989, Case Processing and Control Div., Signed, Chief, Phyllis A. Carrington, a change of Discharge is requested from: Severance, Medical, Par 10 AR 610-210 Applies to: Medical Disability with Disability Pay of 100% for not less than Two Years and Disability Pay from the U.S. ARMY from date of Discharge, 24 Jan. 1962 to date.

The injustice that warrants this change is found in the Clinical Record, Narrative Summary, signed by John E. Lee, Capt., MC, dated 14 Dec., 1961, Register # 6154019, Ward 28A, Valley Forge General Hospital, Phoenixville, Pa., i.e., the first part of Dec., 1961, I developed a drug reaction on a closed ward, being Mentally and Physically overcome to such a severe state as to remember nothing about the Closed Ward stay except being Forced Drugged in a straight-jacket and manhandled inhumanely when first taken to the Closed Ward the end of Nov., 1961. Over two weeks of my life were lost as to memory and only a few memories at the time of discharge from the Valley Forge Hospital about Dec.21,1961, i.e., not able to walk without aid, black-outs and loss of time. Although Col. Michael P. Georges and

Capt. A. Tucker both on Dec.21,1969 signed reports of "considerable impairment", the fact is that I remember nothing except I was forced out of the Service about that same time.

It is noted that the record speaks of a 6 year enlistment, however I was a Professional Military Man on an indefinite time as to enlistment as called for by my duty assignment and high security clearance. Even if there were no other Army Regulations to deal with a discharge of an indefinite enlistment of a Careerman and NCO, which there are, it is injust to terminate any military career of a noncommissioned officer of a combat-arm service when that careerman or careerwoman is ill with lapse of Mental and Physical functions and that Illness was in the line of duty and that same Illness was forced upon the careerman or careerwoman with forced drugging all in the name of debriefing after a foreign duty assignment, which refers back to the debriefing by the 115th INTC GROUP, Fort Lewis, Washington on 29 Sept., 1961 at which time that same 115th INTC GROUP ordered evaluations of the mind at Madigan General Hospital and those *mind evaluations and Forced Drugging* took place at both Madigan and Valley Forge Hospitals up to the time of my injust severance from my military career, 24 Jan., 1962.

From Sept. of 1961 to Jan. of 1962 represents a most inhumane injustice to me and my family, worse is that this forced inhumane injustice was forced on a military careerman by the very same government that that professional military careerman Honorably Served for so many years.

Lastly, the records from Madigan General Hospital reads that: ". . . . since he appeared to be no different than he had been during any of the interviews with

individual members of the team, it was felt that he was non-psychotic..... We feel that in view of this any of the patient's past intelligence work should certainly be viewed with skepticism and of course, his future value in this field is nil..... On 9 Oct. 1969 patient developed some ill-defined physical symptoms of chills and fever which were transitory..... ON 16th Oct., 1961 patient met with Medical Board at which time he was advised that it would be recommended that he be placed on TDR status....." Clinical Record, Narrative Summary, signed, E.V. Niklewski, Captain, MC, 30 Oct 61, RA 13 355 360, Ft. Lewis School Center, Register No. 6116 032, ward no. 27A, Madigan General Hospital, Tacoma, Washington.

Sgt. Danko gave some note of only a paranoid personality and he was non-psychotic, that is that all the members of the MC Team felt Sgt. Danko to be non-psychotic, however after being forced drugged and manhandled in a straight-jacket, Sgt. Danko's behavior changed. Why would a career military person be forced into a General Hospital if he were not ill and forced drugged in that same psychiatric closed ward institution?

Under the 'Admission Note' dated 29 Sept., 1961 and signed by P.B. Smith, Colonel, MC, Chief, Dept of Neuropsychiatry, Madigan General Hospital, the Note reads: "During the Social History intake in his case he continued markedly guarded, volunteering little if any information and refusing to answer any questions relative to the material that led to his referral." If information at debriefing sessions was given to a MR. Frey, CI agent, Fort Lewis, 26201, 115th INTC GROUP, why would any Military man talk to Social Workers and Doctors in a hospital about material from an assignment in a foreign country with duty bound by a Security

Clearance higher than TOP SECRET? Why would an Agent give any such information to a Hospital? Such disregard for Agents, information and operations of National Security can only be negative.

Injustice is here in the Forced Severance Discharge, here in the inhumane treatment for five months to my family and myself, here in the life of mental anguish. In the name of justice it is time to change this discharge as requested in the first part of this letter of reply. I also request to be present at the Military Review Board in order that I may help make my case and show documents that are fact and will substantiate this grave injustice.

Submitted With respect, as requested,

s/ PAUL DANKO, JR., July 7, 89
Paul Danko Jr.

APPENDIX E

United States Constitution, Amendment XIV

ALL persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws.

[V]

APPENDIX F

Excerpts of Law 38 U.S.C.

EXPLANATION

These volumes, comprising Title 38 of the United States Code, contain laws of a general and permanent nature relating to Veterans' Benefits, including all amendments and enactments to August 15, 1991.

Recent events on the world stage have again underscored the importance of America's armed forces. A highly-trained and motivated military was necessary to deal with aggression halfway across the globe. The best-educated soldiers, sailors and airmen in our history, and equipped with the latest and most sophisticated technology and equipment, they were called upon to fight a difficult war in an inhospitable environment. Succeeding beyond all expectations, this country must confront many of the realities of this victory, including a new era of veterans. As they join the ranks of veterans from other conflicts, they will need their fair share of benefits. The laws set out in Title 38 represent the response of a nation that, at times, willingly acceded and, at other times, reluctantly or partially fulfilled demands for better veterans' benefits.

The Vietnam War was a watershed event. This unpopular war destabilized political and social institutions and provoked much antipathy toward the military. Veterans came home embittered and feeling betrayed from lack of support. Many Americans were unwilling to provide compensatory and rehabilitative assistance to those who fought in an "unjust war". Further, national confidence in the selective service

system was so undermined that an all-volunteer military was re-instituted. The needs of recently returned veterans and the improvement of veterans' benefits so that enough men and women volunteered for military service, however, still had to be addressed. Various Veterans' and Survivors' Pension Improvement Acts, Veterans' Disability Compensation and Survivor Benefit Acts, Veterans' Education and Employment Assistance Acts, Veterans' Housing Acts, and Veterans' Health Care Acts were enacted. Legacies from the Vietnam War, the laws established or modernized policies and programs in such areas as veterans' and survivors' educational assistance, vocational rehabilitation, job counseling, training and employment, and training and employment of disabled veterans in addition to revising medical and pension provisions.

As Americans became aware of the plight of Vietnam veterans over the years, Congress was encouraged to pursue more forthright and sympathetic policies. Since the last revision of these volumes [VI] little more than a decade ago, over fifty pieces of legislation have been enacted. Confronting the lingering scars of the war, establishing the Department of Veterans Affairs at the Cabinet level, renumbering Title 38 provisions, and restructuring judicial and administrative implementation of programs were such acts as the Omnibus Budget Reconciliation Acts from recent years, the Veterans' Judicial Review Act, Agent Orange Act of 1991, the Department of Veterans Affairs Health-Care Personnel Act of 1991, the Department of Veterans Affairs Codification Act, and the Veterans' Benefits Programs Improvement Act of 1991. In the future, no doubt, the laws covering veterans' benefits will continue to reflect shifting public and private attitudes toward the military and the needs of veterans. To provide a total

picture for bench and bar and interested public, these volumes contain comprehensive and up-to-date judicial opinions for the construction and application of all the law for Title 38 of the United States Code.

Distribution Table

Title 38 features a distribution table showing the disposition of sections of former Title 38 and the corresponding sections in Revised Title 38 and reflecting those sections which were transferred to other titles of the Code. This table is set out preceding the first section of Title 38.

Library References

Guidance to related materials in other publications is provided by the expanded Library References concept. Under this heading can be found references to administrative law texts, the Code of Federal Regulations, the digest system collating judicial decisions from all jurisdictions, encyclopedic discussions of legal principles, law review articles by professors of law, forms useful in preparing litigation for trial, and texts to assist before and during trial. All volumes cited are published by West Publishing Company with the exception of the Code of Federal Regulations published by the United States Government Printing Office and the law review references.

Regulations

For the convenience of the user, there is included in the Appendix to this title the text of Part 3 of Chapter 1 of Title 38, Code of Federal Regulations.

[VII] EXPLANATION

United States Court of Veterans Appeals Rules of Practice and Procedure

Also included in the Appendix to this title is the text of the Rules of Practice and Procedure of the United States Court of Veterans Appeals, effective May 1, 1991.

Historical and Statutory Notes and Cross References

In addition to the latest text and court constructions, this volume contains complete historical and statutory notes and cross references to related subjects.

Annotations or Notes of Decisions

The case annotations or constructions of the courts are arranged under numbered catchlines so that the user, by referring to the same catchline number in the supplementary pamphlets and pocket parts, can readily locate the latest decisions on any phase of the law. The catchlines are themselves collated and indexed to facilitate access to the judicial and administrative decisions classified in each section.

The annotations are comprehensive, covering decisions of the Federal and State courts, the Comptroller General, the United States Merit Systems Protection Board, the Administrator, Veterans' Administration (A.D.V.A.), and the formal opinions of the Attorney General and the informal opinions of the Office of Legal Counsel of the Department of Justice, construing and applying the laws.

The annotations close with the following:

Reports	Abbreviations
Supreme Court Reporter	111 S.Ct. 1126
Federal Reporter, Second Series	925 F.2d 1480
Federal Supplement	755 F.Supp. 1075
Federal Rules Decisions	133 F.R.D. 620
Atlantic Reporter, Second Series	586 A.2d 1156
California Reporter	278 Cal.Rptr. 835
New York Supplement, Second Series	566 N.Y.S.2d 574
North Eastern Reporter, Second Series	567 N.E.2d 327
North Western Reporter, Second Series	465 N.W.2d 848
Pacific Reporter, Second Series	806 P.2d 307
South Eastern Reporter, Second Series	401 S.E.2d 481
Southern Reporter, Second Series	575 So.2d 42
South Western Reporter, Second Series	803 S.W.2d 887

APPENDIX G

BVA Denial No. 87-35 514 Dated JUNE 21, 1988
(NOTE: two part Docket, Part "A" stamped 819105, a FINAL Decision and Part "B" stamped 81906, a REMAND and not FINAL, all under DOCKET 87-35 514)

IN THE APPEAL OF — Part One of Two

PAUL DANKO, JR. — C 18 309 715

(SEAL)

BOARD OF VETERANS APPEALS
WASHINGTON, D.C. 20420

FINDINGS AND DECISION

DOCKET NO. 87-35 514

DATE JUN 21 1988

THE ISSUE

Entitlement to an increased evaluation for schizophrenia, paranoid type, rated 50 percent disabling.

Entitlement to an increased (compensable) evaluation for prostatitis.

Entitlement to an increased (compensable) evaluation for the residuals of a tonsillectomy.

(The issue of entitlement to an increased (compensable) evaluation for a left shoulder disorder is the subject of a separate decision by the Board of Veterans Appeals.)

819105

REPRESENTATION

Appellant represented by: Veterans of Foreign Wars of the United States

WITNESS AT HEARINGS ON APPEAL

Paul Danko, Jr., appellant

CONSULTATIONS BY THE BOARD

R. Rea, Staff Legal Adviser

ITEMS RELATING TO PRESENT APPELLATE STATUS

The issues on appeal are taken from rating actions which continued a 50 percent evaluation for schizophrenia, paranoid type, and which continued noncompensable evaluations for prostatitis and the residuals of a tonsillectomy.

CONTENTIONS

The veteran and his representative contend that the service-connected disorders at issue warrant either increased or compensable ratings. According to the veteran, his service-connected psychiatric disorder, prostatitis, and the residuals of a tonsillectomy have increased in severity. Specifically, he maintains that neck discomfort and difficulty swallowing are tonsillectomy residuals which meet the criteria for an increased rating. It is also maintained that prostatitis results in urinary dysfunction which warrants a compensable evaluation.

In summary, the veteran has maintained that he is entitled to increased benefits. The representative has requested that various Veterans Administration regulations be applied in the veteran's favor.

THE EVIDENCE

The veteran had active service from August 1950 to July 1954 and from May 1958 to January 1962.

In July 1985, a Veterans Administration examination was conducted. The pertinent physical findings included a normal-sized and -shaped prostate gland. The examiner reported that there was no evidence of dribbling on massage of the prostate gland. It was further reported that any abnormality of swallowing was not demonstrated. There was no evidence of any residual tonsils.

A mental status examination report, completed as part of the July 1985 Veterans Administration examination, shows that the veteran was cooperative, that his responses were slow; that his memory was within normal limits; that he was correctly oriented; that he was coherent and relevant; and that he did not have any hallucinations, delusions, or paranoid ideations. He admitted to intermittent depression, irritability, and anxiety. He had numerous somatic complaints. He claimed that he slept a lot, that he did not have any hobbies, that he watched television, and that he kept himself busy. The examiner concluded that schizophrenia was in remission but that the veteran demonstrated a lot of anxiety and stress because of multiple physical disorders. The diagnoses included a history of schizophrenia, paranoid type, in remission.

The Veterans Administration received numerous private medical records in 1986 and 1987. A January 1987 report from Oscar Urrea, M.D., provides information that the veteran was "known to have psychiatric problems" and that he was not able to work. In January 1987, the Veterans Administration received a November 1986 report from Festus J. Krebs III, M.D. Dr. Krebs reported that a barium swallow revealed a slight deviation of the upper esophagus, caused by degenerative changes of the spine, and a small hiatus hernia.

The veteran testified at a hearing held on appeal at the regional office in January 1987. A verbatim copy of a transcript of the hearing is in the claims folder.

In May 1988, at a hearing held on appeal before the Board of Veterans Appeals in Washington, D.C., the veteran provided testimony and additional medical records. Of pertinent information was a May 1988 report from Dr. Urrea, who mentioned that the veteran was unable to return to work and that "in reference to his emotional status, his situation remains unchanged." Records from Richard A. Finegold, M.D., reveal that the veteran complained of discomfort following sexual intercourse and that physical findings of the prostate, including laboratory findings, were negative. The medical records received into evidence at the hearing are in the claims folder, and a tape recording of the hearing is on file with the Veterans Administration.

THE LAW AND REGULATIONS

Disability evaluations are determined by the application of a schedule of ratings which is based on average impairment of earning capacity. (38 U.S.C. 355; 38 C.F.R. Part 4) Separate diagnostic codes identify the various disabilities.

A 50 percent evaluation is warranted for paranoid type schizophrenia with considerable impairment of social and industrial adaptability. A 70 percent evaluation requires symptomatology which is less than that required for a 100 percent evaluation, but which nevertheless produces severe impairment of social and industrial adaptability. A 100 percent evaluation requires active psychotic manifestations of such extent, severity, depth, persistence, or bizarreness as to produce complete social and industrial inadaptability. (38 C.F.R. Part 4, Code 9203; effective prior to February 3, 1988)

The residuals of prostate injuries, surgery, infections, or hypertrophy are evaluated as chronic cystitis, in accordance with resulting functional disturbance of the bladder, under the provisions of 38 C.F.R. Part 4, Code 7512. (38 C.F.R. Part 4, Code 7527)

A noncompensable evaluation is warranted for mild chronic cystitis. A 10 percent evaluation requires moderate cystitis with pyuria and diurnal and nocturnal frequency. (38 C.F.R. Part 4, Code 7512)

The residuals of healed injuries of the larynx are evaluated on the basis of resulting interference with the voice (aphonia) or interference with respiration. (38 C.F.R. Part 4, Code 6517)

A 10 percent evaluation is warranted for moderate chronic laryngitis with catarrhal inflammation of the vocal cords or mucous membranes and moderate hoarseness. A 30 percent evaluation requires severe chronic laryngitis with marked pathological changes such as inflammation of the vocal cords of mucous membranes, thickening or nodules of the vocal cords or submucous infiltration, and marked hoarseness. (38 C.F.R. Part 4, Code 6516)

Where the minimum schedular evaluation requires residuals and the schedule does not provide a noncompensable evaluation, a noncompensable evaluation will be assigned when the required residuals are not shown. (38 C.F.R. 4.31)

DISCUSSION AND EVALUATION

The veteran claims that he is entitled to an increased rating for schizophrenia. When he was examined by the Veterans Administration in 1985, there was no evidence of hallucinations, delusions, or paranoid thinking. In

addition, the examiner reported that schizophrenia was in remission. The veteran has submitted private medical records from his private psychiatrist who has stated that his emotional state is unchanged. Since there is no medical evidence of currently active psychotic manifestations, the Board concludes that an increased rating is not warranted for schizophrenia.

It is maintained that prostatitis meets the criteria for a compensable evaluation. In 1985, an examination of the prostate gland did not reveal any significant abnormalities. Moreover, in 1988, the veteran consulted his private physician who reported that the prostate gland was essentially unremarkable. Moreover, laboratory studies conducted by the private physician were within normal limits. Hence, we conclude that there is insufficient medical evidence to support the claim for a compensable rating for prostatitis.

It is asserted by the veteran that the residuals of a tonsillectomy interfere with his ability to swallow. The Veterans Administration examiner reported in 1985 that there was no demonstrated abnormality of the ability to swallow. In addition, the physical examination did not reveal any evidence of abnormal residuals of the tonsillectomy. While a private physician reported in 1986 that there was an abnormality of the upper esophagus, this physician did not attribute this abnormality to the residuals of the tonsillectomy. Based on the private medical evidence, the Board concludes that the criteria for a compensable evaluation for the residuals of a tonsillectomy are not met.

FINDINGS OF FACT

1. The veteran has a history of schizophrenia, paranoid type, and his current psychiatric symptoms include intermittent depression, anxiety, and irritability.

2. Active psychotic manifestations productive of severe social and industrial impairment are not demonstrated in the medical evidence.

3. He has a history of prostatitis.

4. The recent clinical findings reveal a normal prostate gland and normal pertinent laboratory studies.

5. The residuals of a tonsillectomy are not manifested by any interference with the voice or respiration or by any throat abnormality.

CONCLUSIONS OF LAW

1. The criteria for an evaluation for schizophrenia, paranoid type, in excess of 50 percent are not met. (38 U.S.C. 355; 38 C.F.R. Part 4, Code 9203)

2. The criteria for a compensable evaluation for prostatitis are not met. (38 U.S.C. 355; 38 C.F.R. Part 4, Codes 7512-7527)

3. The criteria for a compensable evaluation for the residuals of a tonsillectomy are not met. (38 U.S.C. 355; 38 C.F.R. 4.31, Part 4, Codes 6516-6517)

DECISION

Entitlement to an increased evaluation for schizophrenia, paranoid type, is not established. Entitlement to an increased (compensable) evaluation for prostatitis is not established. Entitlement to an increased (compensable) evaluation for the residuals of a tonsillectomy is not established. The appeal is denied.

s/ ANTHONY FAVA
ANTHONY FAVA

s/ J. IMBURG, M.D.
J. IMBURG, M.D.

s/ EUGENE O'NEILL
EUGENE O'NEILL

IN THE APPEAL OF
PAUL DANKO, JR.

Part Two of Two

C 18 309 715

(SEAL)

BOARD OF VETERANS APPEALS
WASHINGTON, D.C. 20420

FINDINGS AND DECISION

DOCKET NO. 87-35 514

DATE JUN 21 1988

THE ISSUE

Entitlement to an increased (compensable) evaluation for a left shoulder disorder.

(Entitlement to an increased evaluation for schizophrenia, paranoid type, rated 50 percent disabling, and for increased (compensable) evaluations for prostatitis and the residuals of a tonsillectomy are the subject of a separate decision by the Board of Veterans Appeals.)

REPRESENTATION

Appellant represented by: Veterans of Foreign Wars of the United States

WITNESS AT HEARINGS ON APPEAL

Paul Danko, Jr., appellant

CONSULTATIONS BY THE BOARD

R. Rea, Staff Legal Adviser

819106

REMAND

The veteran had active service from August 1950 to July 1954 and from May 1958 to January 1962.

The issue on appeal has been taken from rating actions which confirmed a noncompensable evaluation for a left shoulder disorder, currently evaluated as separation of the left acromioclavicular joint. The veteran and his representative contend that this disorder warrants a compensable evaluation.

In medical records dated in 1988, private physicians reported various findings, including degenerative changes of the left shoulder. A Veterans Administration examination conducted in January 1987 did not include a report of radiographic findings of the left shoulder. Hence, it is the opinion of the Board of Veterans Appeals that additional development of the evidence is warranted in this case. This issue is REMANDED to the regional office for the following action:

> A Veterans Administration orthopedic examination should be scheduled to determine the severity of the service-connected left shoulder disorder. As part of this examination, X-rays should be performed. It is requested that the *claims folder* be made available to the examiner for a preexamination review.

Once this development has been completed, this issue for a compensable evaluation for the left shoulder disorder should be considered by the regional office. If the determination remains adverse to the veteran, he and his representative should be given copies of a supplemental statement of the case and be allowed an opportunity to respond. The case should then be returned to the Board, if in order, for further appellate consideration. The purpose of this REMAND is to obtain clarifying medical evidence. There is no action required of the veteran until he is notified by the Veterans Administration.

s/ ANTHONY FAVA
ANTHONY FAVA

s/ J. IMBURG, M.D.
J. IMBURG, M.D.

s/ EUGENE O'NEILL
EUGENE O'NEILL

APPENDIX H

BVA Denial No. 80-08 474
Dated August 1, 1980

(SEAL)

BOARD OF VETERANS APPEALS
WASHINGTON, D.C. 20420

IN REPLY
REFER TO: 014C

1

AUG 01 1980

Mr. Paul Danko, Jr.
415 Victoria Avenue
Belle Vernon, PA 15012

Dear Mr. Danko:

The Board has made its decision on the appeal in this case. I am enclosing a copy, which is self-explanatory. Your records are being returned to the office which has jurisdiction over your claim.

Sincerely yours,

s/ SYDNEY J. SHUMAN
SYDNEY J. SHUMAN
Chairman

Enclosure

Copy of BVA decision

FL 1-1
Jan 1975(RS)

"To care for him who shall have borne the battle, and for his widow, and his orphan."
—ABRAHAM LINCOLN

Peter Storey, Staff Legal Adviser

IN THE APPEAL OF

PAUL DANKO, JR. C 18 309 715

(SEAL)

BOARD OF VETERANS APPEALS
WASHINGTON, D.C. 20420

FINDINGS AND DECISION

DOCKET NO. 80-08 474

DATE AUG 01 1980

THE ISSUE

Entitlement to a total compensation rating based upon individual unemployability.

REPRESENTATION

Appellant represented by: Veterans of Foreign Wars of the United States

WITNESS AT HEARING ON APPEAL

P. D., Jr., appellant

CONSULTATIONS BY THE BOARD

Peter Storey, Staff Legal Adviser

ACTIONS LEADING TO PRESENT APPELLATE STATUS

The matter of the veteran's entitlement to a compensable evaluation for dermatitis, raised by the accredited representative in an informal hearing presentation in July 1980, has not been certified for our review or otherwise appropriately developed for appellate consideration. This issue, therefore, is directed to the rating agency of original jurisdiction for their attention.

CONTENTIONS

A complete transcript of the personal hearing conducted in November 1979 is of record.

It is contended by and on behalf of the former serviceman, in substance, that his combined service-connected disabilities—primarily nervous exhaustion—have rendered him unable to work. Nervous symptoms prevented the veteran from continuing in his accustomed position as a high school teacher. The nervous condition seems to exaggerate symptoms associated with the physical disabilities. Reference is made to the conclusion of unemployability made by the veteran's longtime family doctor.

THE EVIDENCE

The veteran was on active duty from August 1950 to July 1954 and from May 1958 until January 1962.

Service connection has been established for schizophrenic reaction, paranoid type, evaluated as fifty per cent (50%) disabling since 1962. Also, noncompensable ratings have been assigned for service-connected prostatitis, eczema, herniorrhaphy, fracture of the left third finger, separation of the left acromioclavicular joint, and tonsillectomy.

According to an income and employment statement signed by the veteran in November 1979, he has had a college education, occupational experience as a schoolteacher, and became totally disabled in April 1979. Statements signed by the superintendent of schools in July 1979 disclose that the claimant left his teaching position in April 1979, reportedly due to a physical problem. A leave of absence had not been approved as of July 1979, and it was indicated that the veteran had not pursued the proper procedures for retirement from the school system.

Also accompanying the pending claim was a statement prepared by the veteran's long-term personal physican in October 1979. This was to the effect that the veteran had been under his care for disabilities including prostatitis, arthritis and a nervous tension state. In 1977, his patient reportedly had lost 12 months of work because of disability. The physician was of the opinion that such disability made it impossible for the veteran to perform at his usual occupation of high school classroom teacher and achieve any substantial gainful work. It was remarked that his condition had been severely aggravated since April 1979.

Following the veteran's personal hearing, in November 1979, he was scheduled for a rating examination, which occurred in December 1979. The report of examination discloses that, on general medical examination, he complained of a prostate infection, tenderness at the tips of his fingers with dryness of the skin, recurrent pain in the rectal and scrotal areas, limitation of motion of the left shoulder, and a painful third finger on the left hand. Physical examination revealed that the prostate was not palpably enlarged. The veteran complained of moderate tenderness on prostatic massage. He was observed to have some dryness of the tips of all fingers with minimal scaling. There were no open cracks or fissures. The fingernail of the left middle finger was very tender to pressure. Further examination disclosed no evident hernia. X-ray study disclosed a small calcific deposit adjacent to the greater tuberosity of the left shoulder, indicative of a calcifying tendinitis. Left shoulder motion was mildly to moderately diminished when compared with the right.

A special psychiatric examination was also conducted in December 1979. The veteran's main complaints were of fatigue and nervousness. The nervousness was expressed

in such feelings as becoming short-winded, having spasms across the chest, and having feelings as if he were going to black out. He related that he had been hospitalized about one year earlier for chest pain. Current medications included Tranxene. Examination of mental status revealed that the appellant was pleasant and cooperative during the session. He admitted to a feeling of tenseness, but could not describe a clear reason for it. No delusions or hallucinations were elicited. There were some feelings possibly of mistreatment through the Veterans Administration. Generally, thinking appeared organized, and the veteran's affect appeared appropriate. Recent and remote memory appeared to be intact. He appeared to have some insight into his problems. Judgment appeared fairly good. He was believed to be competent. The diagnostic assessment was schizophrenia, paranoid type, diagnosis based on the records, in fair to partial remission. The main symptoms were described as anxiety, possibly associated with many physical complaints of a psychological basis.

The diagnoses listed upon the conclusion of the general medical examination in December 1979 were prostatitis; eczema, dyshydrotic; herniorrhaphy, right; fracture, left middle finger; separation, left acromioclavicular joint.

Other statements submitted by private physicians note, in substance, that tension and stress were often manifested by daytime clinching of the teeth and subconscious grinding of the teeth at night. The veteran's personal physician apparently signed a Federal disability application in January 1980 to the effect that the veteran was permanently and totally disabled. A private dermatologist described a flareup of eczematous dermatitis of the distal aspects of the right and left digits in May 1980. The family physician also noted that the main diagnosis was degenerative arthritis of the

dorsal spine, compounded by an anxiety behavioral pattern reflected in symptoms of nervous exhaustion, chest pains, and gastrointestinal distress.

A copy of a Social Security Administration award of disability effective from April 1979 has been submitted for the record.

THE LAW AND REGULATIONS

Total disability ratings for compensation may be assigned where the schedular rating for the service-connected disability or disabilities is less than one hundred per cent (100%) when it is found that the service-connected disabilities are sufficient to produce unemployability without regard to advancing age. (38 C.F.R. 3.321, 3.340, 3.341, 4.16)

DISCUSSION AND EVALUATION

The considerable medical evidence has been studied in light of the contentions advanced on appeal. The veteran's main belief, in substance, is that his psychiatric disorder causes him to be in state of nervous exhaustion most of the time, complicated by a host of physical symptoms which may have a partial psychological basis.

We agree that the veteran's nervous symptoms are a substantial source of his overall disability, but we do not agree that this disability is so profound as to render him unemployable. Here, we are guided by the report of official psychiatric examination in December 1979, which found the veteran's psychiatric condition to be in at least partial remission. These clinical findings were supplemented by many reports from private doctors, which noted as well that the veteran had a significant arthritic disability (which is not the subject of service connection).

The Board of Veterans Appeals is obliged to apply rating criteria that may differ from those of other Federal agencies. A teacher with a college education usually obtains a broad background of knowledge and skills, and we cannot conclude on the present record that the veteran is prevented by service-connected disability from engaging in some form of substantially gainful employment for which he is suited.

FINDINGS OF FACT

1. The veteran has had a college education, considerable employment experience as a high school classroom teacher, and reports having last worked in April 1979, when he voluntarily left his duties in the classroom.

2. His predominant service-connected disability is schizophrenic reaction, which was regarded as in partial remission on last rating examination of record, manifested primarily by anxiety, somatic complaints, and a subjective feeling of nervous exhaustion.

3. The veteran is not so disabled by service-connected disability as to prevent him from engaging in some form of substantially gainful employment in keeping with education and occupational background.

CONCLUSION OF LAW

The appellant is not unemployable due to service-connected disability. (38 C.F.R. 3.321, 3.340, 3.341, 4.16)

DECISION

Entitlement to a total compensation rating based upon individual unemployability is not established. The appeal is denied.

s/ H. H. CLARK
H. H. CLARK

s/ T. H. WELLS, M.D.
T. H. WELLS, M.D.

s/ L. P. SUMMERS
L. P. SUMMERS

APPENDIX I

Verbal Opinion by VARO

RECORD OF VERBAL OPINION OF VARO ON NODs

From May 10, 1989 to 1991 after COVA was in operation, the Disabled Veteran appealed at the RO in Pittsburgh, to disagree with the VARO and the BVA actions in this instant case under BVA Docket No. 87-35 514, and Veteran's Claim File No. C-18-309-715. The RO told the Disabled Veteran Danko several times that the VARO had no records and that the case was on remand and Pittsburgh RO could not take input into what was on Remand until the Remand Order was ended, that the VA policy was to deal only with one issue at a time because the Veteran's records file C 18 309 715, both parts, Administrative and Medical, was not present in the Pittsburgh RO.

The disabled Veteran asked just what would happen if he needed the Medical Records for treatment at the VARO Oakland Medical Center for his five already established service connected rated disabilities at that time, the answer by Veteran Service Officer, B. Kersting, was that it would be difficult. The Remand Order took precedence because it was Ordered by BVA, the VARO Service Officer Kersting, after advise from RO Adjudication, handed back to the disabled Veteran the five new Medical Reports on Physician's letterheads and over their signatures and an NOD cover five of the service connected disabilities that were in COVA. ALL the above official documents were returned Kersting's hand to the disabled Veteran along with letter from the VARO service officer B. Kersting. This incident of verbal opinion took place on October 5, 1990, in the Federal Building, 1000 Liberty Avenue, Pittsburgh, PA 15222. (DANKO Exhibit 9).

Note that the NOD enclosed in Appendix H, NOD dated October 5, 1990 dealt with the May 10, 1990 decisions, on the two parts of the same BVA Docket No. and disagreed with both on each part of the docket.

PAUL DANKO, Jr. the disabled Veteran, verifies that the facts set forth above are true and correct as he verily believes and this statement is made subject to the laws on perjury.

Dated: July 31, 1995

s/ PAUL DANKO, JR.
Paul Danko, Jr.

APPENDIX J

Appendix J Intentionally Omitted

RE-4

LEGEND: Insert N/A in the items below which are not applicable

PERSONAL DATA

1. LAST NAME - FIRST NAME - MIDDLE NAME	2. SERVICE NUMBER	2a. GRADE, RATE OR RANK	3. DATE OF RANK (Day, Month, Year)
Danko Paul Jr	RA 13 355 367	SGT E-5 (T)	4 Feb 58

4. DEPARTMENT, COMPONENT AND BRANCH OR CLASS	5. PLACE OF BIRTH (City and State or Country)	6. DATE OF BIRTH	DAY	MONTH	YEAR
ARMY RA INF	Daisytown Pennsylvania		28	Jul	33

7a. RACE	7b. SEX	8. COLOR HAIR	8. COLOR EYES	8. HEIGHT	8. WEIGHT	9. U.S. CITIZEN	9. MARITAL STATUS
Caucasian	Male	Brown	Blue	5'7	160	[X] YES [ ] NO	Married

10a. HIGHEST CIVILIAN EDUCATION LEVEL ATTAINED	10b. MAJOR COURSE OR FIELD
2 years College	Industrial Design

TRANSFER OR DISCHARGE DATA

11a. TYPE OF TRANSFER OR DISCHARGE	11b. STATION OR INSTALLATION AT WHICH EFFECTED
Discharge	Tacoma Washington

11c. REASON AND AUTHORITY	11d. EFFECTIVE DATE	DAY	MONTH	YEAR
Physical Disability Par 5c (1) AR635-40A SPN 273 & Mag AGPO-XS 44943		24	Jan	62

12. LAST DUTY ASSIGNMENT AND MAJOR COMMAND	13a. CHARACTER OF SERVICE	13b. TYPE OF CERTIFICATE ISSUED
Co B (Prov) USAG 600-60 Ft Lewis Wash	HONORABLE	DD Form 256A

SELECTIVE SERVICE DATA

14. SELECTIVE SERVICE NUMBER	15. SELECTIVE SERVICE LOCAL BOARD NUMBER, CITY, COUNTY AND STATE	16. DATE INDUCTED		
		DAY	MONTH	YEAR
36 163 33 550	LB# 163 Charlerpi (Washington) Pennsylvania		NA	

17. DISTRICT OR AREA COMMAND TO WHICH RESERVIST TRANSFERRED

NA

SERVICE DATA

18. TERMINAL DATE OF RESERVE OBLIGATION			19. CURRENT ACTIVE SERVICE OTHER THAN BY INDUCTION a. SOURCE OF ENTRY	19b. TERM OF SERVICE (Years)	19c. DATE OF ENTRY		
DAY	MONTH	YEAR			DAY	MONTH	YEAR
NA			[ ] ENLISTED (First Enlistment) [ ] ENLISTED (Prior Service) [X] REENLISTED [ ] OTHER	6	7	May	58

20. PRIOR REGULAR ENLISTMENTS	21. GRADE, RATE OR RANK AT TIME OF ENTRY INTO CURRENT ACTIVE SERVICE	22. PLACE OF ENTRY INTO CURRENT ACTIVE SERVICE (City and State)
None	SGT E-5	Fort George G Meade Maryland

23. HOME OF RECORD AT TIME OF ENTRY INTO ACTIVE SERVICE (Street, RFD, City, County and State)	24. STATEMENT OF SERVICE		YEARS	MONTHS	DAYS
Box 204 Daisytown (Washington) Pennsylvania	a. CREDITABLE FOR BASIC PAY PURPOSES	(1) NEW SERVICE THIS PERIOD	3	8	18
		(2) OTHER SERVICE	5	7	7
		(3) TOTAL (Line (1) + line (2))	9	3	25
	b. TOTAL ACTIVE SERVICE		7	10	19
	c. FOREIGN AND/OR SEA SERVICE		3	0	21

25a. SPECIALTY NUMBER AND TITLE	25b. RELATED CIVILIAN OCCUPATION AND D. O. T. NUMBER
113.60 Inf Opns & Intel Spec	None

26. DECORATIONS, MEDALS, BADGES, COMMENDATIONS, CITATIONS AND CAMPAIGN RIBBONS AWARDED OR AUTHORIZED

Sharpshooter (Carbine)

27. WOUNDS RECEIVED AS A RESULT OF ACTION WITH ENEMY FORCES (Place and date, if known)

None

28. SERVICE SCHOOLS OR COLLEGES, COLLEGE TRAINING COURSES AND/OR POST-GRADUATE COURSES SUCCESSFULLY COMPLETED

SCHOOL OR COURSE	DATES (From - To)	MAJOR COURSES
None	NA	NA

29. OTHER SERVICE TRAINING COURSES SUCCESSFULLY COMPLETED

None

VA DATA

30a. GOVERNMENT LIFE INSURANCE IN FORCE	30b. AMOUNT OF ALLOTMENT	30c. MONTH ALLOTMENT DISCONTINUED
[ ] YES [X] NO	NA	NA

31a. VA BENEFITS PREVIOUSLY APPLIED FOR (Specify type)	31b. VA CLAIM NUMBER
Education	C- Unknown

AUTHENTICATION

32. REMARKS

No time lost under 10 USC 972
Par 10 AR601-210 applies
Item 3a: PFC E-3 (P) Date of Rank: 4 Feb 58
Item 11b: Separation papers prepared at Valley Forge GH Phoenixville Pa
Zero balance leave SSAN: 169-26-7266
Paid Severance Pay $3520.00 Dsabl: 10% Blood Group: "A"

33. PERMANENT ADDRESS FOR MAILING PURPOSES AFTER TRANSFER OR DISCHARGE (Street, RFD, City, County and State)	34. SIGNATURE OF PERSON BEING TRANSFERRED OR DISCHARGED
9518 Veterans Drive SW Tacoma Washington	
35a. TYPED NAME, GRADE AND TITLE OF AUTHORIZING OFFICER	35b. SIGNATURE OF OFFICER AUTHORIZED TO SIGN
JAMES G SMYTH, CWO, W-3, USA Asst Adjutant	James G. Smyth

DD FORM 1 NOV 68 214 REPLACES EDITION OF 1 JUL 62, WHICH IS OBSOLETE.

ARMED FORCES OF THE UNITED STATES
REPORT OF TRANSFER OR DISCHARGE

1

APPENDIX K

A73

Honorable Discharge from the United States
Army DD Form 214, Dated January 24, 1962

Paul Danko Jr.
415 Victoria Ave.
Belle Vernon, Pa., 15012

SS# 169 26 7266
C# 18 309 715

May 15, 89

Veterans Administration
Regional office
Fed. Bldg, Liberty Ave.
Pittsburgh, Pa. 15222

Subject:
NOTICE OF DISAGREEMENT,
Appeal of Findings and
Decision of Board of Veterans
Appeals, Wash. D.C. 20420
Dated JUN 21, 1988
Docket NO. 87-35-514
Request for Federal Court.

Dear Sir;

I request that this appeal now be Listed for Federal Court in as much as your findings are not in accord with the Law and the facts now of record. A decision given in June of 1988 based on 1985 Veterans Administration Medical examinations as stated in your "Discussion AND Evaluation" in you Docket NO. 87-35-514, this Case, is indeed injust and not with the spirit of fairness, on the contrary it is an adverse impartial, dispassionate - and prejudices Act.

Requesting Veteran,
Paul Danko Jr.

A75
APPENDIX L
Danko NOD to RO Dated May 15, 1989

A76

P.20

Paul Danko Jr.
415 Vic...
Belle Va... Pa. 15012

35th Inf. Div. 7266 Alex. Va.
CF 183-9715

Veterans Administration
Regional office
Fed. Bldg, Liberty Ave
Pittsburgh, Pa. 15222

Subject:
NOTICE OF Disagreement;
Appeal of Findings and
Decision of Board of Veterans
Appeals, Wash DC 20420
Dated Jun 21, 1988
Docket NO. 87-35-514
Request for Federal Court.

Dear Sir,

I request that this appeal case be Listed for Federal Court as well as your findings are not in accord with the Law and the facts now of record. A decision Given in June of 1988 based on 1955 Veterans Administration Medical examinations as stated in your "Discussion AND Evaluation" in your Docket NO. 87-35-514, this case, is indeed unjust and not with the spirit of fairness; in the interest it is an adverse impartial, dispassionate and prejudices Act.

Requesting Veteran,
Paul Danko Jr.

June 8, 1989

...F: Second Posting of this Notice because of no ... RA as of June 8, 1989. also ...

RECORD ON APPEAL

p. 22

Paul Danko Jr.
415 Victoria St.
Belle Vernon, PA. 15012

tel: 412-929-5596

C-18 309 715
SS# 169-26-7266
Date: Oct. 5, 1990

Veterans Administration
Regional office
1000 Liberty Ave., Fed. Bldg.
Pittsburgh, Pa. 15222

Subject: Notice of Disagreement of May 10, 1990 Decision, Remand. BVA docket # 87-35-514. and other service connected disability Awards, same docket No. as above.

Dear Sir,

With reference to your May 10, 1990 Decision, this notice of disagreement in my case is to let you know that your decision is erroneous. This case is unjust and not fair. Could you please acknowledge my request for medical records and other letters of notices of disagreement for my service connected disabilities, all of BVA docket # 87-35-514.

Submitted by Veteran,
Paul Danko Jr.

BVA and CAVA: erred when they did not take note of this NOD dated Oct. 5, 90 - the BVA and Pgh. RO did not put this record forward - in fact Pgh. RO. only sent 4 pages of Rec.

"COPY"

p. 2 of 3 ~~p. 10~~

APPENDIX O

Award, In re: Willard B. Bartusch, BVA Docket No. 90-26-396, COVA Docket No. 91-46, Dated December 1991

HUDOCK, SAWYER & AZARCON, P.C.
ATTORNEYS AT LAW
8150 LEESBURG PIKE
SUITE 600
VIENNA, VIRGINIA 22182

(703) 893-0760

JOHN D. SAWYER (VA., D.C., MASS.)
JANUARIO G. AZARCON (VA., D.C.)
OF COUNSEL:
ROBERT P. HUDOCK (VA., DC., PA.)
TIEN D. PHAM (PA.)

FOR IMMEDIATE RELEASE:
Thursday; October 15, 1992

BVA AWARDS VETERAN $45,000 IN PAST-DUE BENEFITS; AWARD WILL INCREASE MONTHLY BENEFIT BY $1,000

In a major decision of far-reaching importance to disabled veterans, the Board of Veterans Appeals (BVA) recently awarded an Arizona veteran approximately $45,000 in past-due benefits and increased his current monthly benefit by over $1,000, by granting the veteran a total disability rating based on individual unemployability. Total additional benefits to be received by the veteran over his lifetime are estimated to approach $175,000, in one of the largest awards since judicial review began in 1989.

The August 1992 BVA decision was its second in this matter, and followed a July 1991 remand of its initial decision, after an appeal to the U.S. Court of Veterans Appeals (COVA).

The BVA's decision immediately awards the veteran approximately $45,000 in past-due benefits from the date of his original claim. The veteran's current monthly benefit will increase by more than $1,000.

In November 1988, the veteran filed a request with VA for an increased rating, alleging that he was entitled to a total, 100-percent disability (rather than the 60-percent service-connected disability rating that he held at the time) based upon the veteran's unemployability. The claim was denied by the regional office.

A BVA panel subsequently denied the claim on appeal, concluding that the veteran was able to pursue gainful employment. The veteran appealed the ruling to COVA, and COVA then remanded the case to BVA for reconsideration.

At issue was whether a veteran should be found unemployable if he or she cannot work, even if an average person with the same disabilities could pursue some form of gainful employment.

In December 1991, VA Office of the General Counsel issued an opinion in the veteran's case analyzing the issue of unemployability. General Counsel found that VA's use of the term "unemployability" and VA's regulations concerning the ability to "secure and follow a substantially gainful occupation" were the same. Moreover, the General Counsel concluded that "unemployability" relies on a subjective veteran-by-veteran analysis, rather than the objective, average person approach.

The $45,000 award in *In Re: Willard B. Bartusch, BVA Docket #90-26 396, COVA Docket #91-46* was achieved through the representation of John D. Sawyer, Esq., counsel for the veteran and a principal in the

Vienna, Virginia law firm of Hudock, Sawyer & Azarcon. In addition to concentrating in veterans law, Mr. Sawyer also is a CPA and former staff attorney with the BVA.

Mr. Sawyer is now concentrating his veterans law practice to the areas of service-connected death; denial of entitlement to total disability ratings based on individual unemployability; termination of total entitlement based on a finding of a lack unemployability; and entitlement to retroactive benefits (involving recognition of "earlier effective date" and administrative allowance matters).

Mr. Sawyer now offers consultation to any aggrieved veterans or their counsel in the above areas. He may be reached by telephoning (703) 893-0760.